Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Chapman* v. *California*, this Court held that a constitutional error requires reversal if there is "a reasonable possibility that the [error] complained of might have contributed to the conviction." 386 U.S. 18, 23-24 (1967). Constitutional error may be found harmless only if the prosecution establishes "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained." *Id.* at 24. In *Sullivan* v. *Louisiana*, the Court held that this focus on the verdict "obtained" is required by the Sixth Amendment: A court must examine "the basis on which the jury *actually rested* its verdict," rather than the effect that the "error might generally be expected to have upon a reasonable jury." 508 U.S. 275, 279 (1993).

In the aftermath of *Neder* v. *United States*, 527 U.S. 1 (1999), however, several state and federal courts, including the Seventh Circuit in this case, have repudiated this traditional approach. Although this Court has already ruled that the instructions in this case authorized conviction for conduct that is not a crime, the Seventh Circuit held the error harmless after marshaling *only* the government's evidence on hotly disputed issues and pronouncing it "overwhelming" enough to persuade "a reasonable jury." Petitioners had been acquitted on numerous charges based on the same supposedly "overwhelming" evidence. The question presented is:

Whether the right to trial by a jury, and *Chapman* v. *California* and its progeny, permit a court to deem a constitutional error "harmless" solely because the government's evidence purportedly supports guilt, without crediting evidence that favors acquittal or assessing the impact of the error on the jury that actually heard the case.

PARTIES TO THE PROCEEDING

Petitioners were defendants in the district court. Mark S. Kipnis was a co-defendant in the district court and was a party to the decision below. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and are not parties before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Conrad M. Black, John A. Boultbee, and Peter Y. Atkinson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-14a) is published at 625 F.3d 386. An earlier opinion of the Seventh Circuit (App., *infra*, 17a-33a), which this Court reviewed and vacated, *see* 130 S. Ct. 2963, is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2010. A timely petition for rehearing was denied on December 17, 2010. App., *infra*, 15a-16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Due Process Clause of the Fifth Amendment provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The provisions of 28 U.S.C. §§ 2106 and 2111 and of Federal Rule of Criminal Procedure 52 are set forth in the Appendix. App., *infra*, 34a-35a.

STATEMENT

The government tried petitioners on a 17-count information alleging they looted $60 million from the public company of which they were officers. After a four-month trial, however, the jury acquitted petitioners on nearly all counts, including the most serious. The jury convicted on just three counts of mail fraud and, as to Black alone, a single count of obstruction of justice based on instructions expressly referencing the criminal fraud investigation and trial. This Court granted certiorari and held that the jury charge permitted conviction for conduct that is not mail fraud.

On remand, the Seventh Circuit vacated two fraud counts but held that the error was harmless as to the third count, as well as the related obstruction conviction. With respect to both sets of rulings—vacatur and affirmance—the court marshaled the evidence in the light most favorable to the convictions. The court dismissed the defense evidence that had supported acquittal on the majority of the counts as "implausible," "decisively unbelievable," and "clowning." App., *infra*, 11a-12a. On the basis of this one-sided review, the court concluded that the government's case on the counts at issue here was "so compelling that no reasonable jury could have refused to convict." *Id.* at 14a.

A. Hollinger's Newspaper Sales

Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware media company. Black was Hollinger's Chairman and

Chief Executive Officer. Boultbee was Hollinger's Executive Vice President and, for a time, its Chief Financial Officer. Atkinson was Hollinger's Vice President.[1] David Radler, Hollinger's President and Chief Operating Officer, became the government's star witness at trial in exchange for leniency.

Although Hollinger ultimately became an international media empire with capitalization exceeding $2 billion, it had its roots in the 1969 acquisition of a single community newspaper by Black and Radler. Under their successful management, Hollinger acquired hundreds of community newspapers, as well as several renowned national publications such as the *Daily Telegraph* of London, the *Jerusalem Post*, *The Chicago Sun Times*, and the *National Post* of Canada. Tr. 8125, 8131, 8142, 8159-76.

The business was managed through Ravelston Corp. Ltd. (Ravelston), a Canadian company in which Black was majority shareholder; the combined holdings of defendants totaled nearly 80%. Ravelston, in turn, owned a controlling interest in Hollinger, Inc. (Inc.), a Canadian holding company that controlled Hollinger through a super-majority of voting shares. Hollinger typically did not pay petitioners or Radler directly; they were instead compen-

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[1] The jury convicted petitioners and Mark Kipnis, Hollinger's Corporate Counsel and Secretary, on the mail fraud charges in counts 1, 6, and 7, but the trial judge set aside Kipnis's count 7 conviction for insufficient evidence. On remand from this Court, the Seventh Circuit vacated only the convictions on counts 1 and 6 as to each defendant. Therefore, each petitioner now stands convicted of count 7, and Black also remains convicted of count 13 (obstruction of justice).

sated by Ravelston based on substantial management fees from Hollinger.

In the 1990s, Black correctly foresaw the Internet's adverse consequences for Hollinger's media properties. Under his leadership, Hollinger's board of directors voted to divest the company of its smaller newspapers. The sales were consummated in a series of transactions with various purchasers. A common feature of these deals was that the seller (Hollinger), its Canadian holding company (Inc.), and, at times, Hollinger's corporate officers (including petitioners and Radler) would execute agreements not to compete with the purchaser and would receive part of the sales proceeds as consideration for such covenants.

B. Criminal Charges

The government charged that the covenants and related payments to Inc. and the individuals were *both* means to "steal" sales proceeds that should have gone solely to Hollinger *and* violations of fiduciary duties imposed by Delaware law and thus a deprivation of petitioners' "honest services" owed to Hollinger. The indictment (later superseded by an information) alleged that defendants developed a "template" for violating their duties and diverting sales proceeds to Inc. and, later, directly to themselves. This "template" began with a sale of community newspapers to Community Newspaper Holdings, Inc. (CNHI) and continued through sales to Forum Communications and Paxton Media Group. App., *infra*, 53a-59a. Count 7, the sole remaining fraud conviction, stemmed from these Forum/Paxton sales.

The government's theory of theft was that neither Inc. nor the individuals were credible competitors of anyone, but that the defendants benefited

from pushing payments "upstream" in the corporate structure, because (through Ravelston) they owned more equity in Inc. than they did in Hollinger. Gov't C.A. Br. 3-6 (2008).

The government's theory of honest services was that the covenants and their implementation involved fiduciary breaches, including undisclosed "related-party transactions." Gov't C.A. Br. 3-6 (2008). With nearly identical language in each relevant fraud count, the information charged that the defendants "failed to disclose these related party transactions to [Hollinger's] Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving [Hollinger] of honest services, and concealing the scheme." App., *infra*, 57a-59a ¶¶ 18, 21 (Forum/Paxton—counts 2, 3, and 7); *id.* at 63a-64a ¶ 30 (American Publishing Company (APC)—counts 1 and 6).

The government alleged in other counts the abuse of corporate "perquisites" to fund Black's lavish style, and it charged racketeering (including interstate transportation of "stolen" property predicates), tax violations (alleging that petitioners' "thefts" caused Hollinger to understate its tax liability), and money laundering. The final count charged Black alone with obstruction of justice, in violation of 18 U.S.C. § 1512, for purportedly endeavoring to impede his criminal fraud investigation and prosecution by moving his personal effects from his Toronto office to his nearby house when evicted from his office.

C. The Trial and Appeal

1. As the government has conceded, the defendants "hotly contested" each of the charges at trial; "[d]efendants vigorously cross-examined the govern-

ment's witnesses, and each defendant called witnesses in his own case." Gov't C.A. Br. 29-30 (2008). The defense contended that would-be purchasers of Hollinger's newspapers wanted the noncompetition covenants because they feared competition from the executive team that had successfully built Hollinger into an international media empire from a single community newspaper.

a. Whether the purchasers had requested covenants was a key issue with respect to the supposed fraud on the Forum/Paxton sales, which was charged in three counts. Counts 2 and 3 attacked payments made to Inc.; count 7 challenged a $600,000 payment made to petitioners and Radler. The government elicited testimony from the purchasers that neither had requested or desired non-compete agreements from Inc. or the individual officers. App., *infra*, 145a-154a.

According to a contemporary memorandum by Radler, however, the Forum/Paxton purchasers had requested non-competition agreements with individual officers. App., *infra*, 319a-320a. The same memorandum reported an identical request from another purchaser of other properties (CNHI), which the government later charged as fraud in count 5 (on which the jury acquitted). Radler's memorandum quipped that these covenants would soon require petitioners to confine their business to an office in Casper, Wyoming. *Id.* at 320a.[2]

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[2] Similarly, a contemporary memorandum from Kipnis to the Audit Committee explained that another purchaser (CanWest) had requested non-competition covenants from individual officers, and it adverted to the fact that similar covenants would be

[Footnote continued on next page]

The evidence also showed that each member of Hollinger's Audit Committee signed SEC filings representing that covenants had been requested by various purchasers (including Forum and Paxton) and duly approved by that committee. Their testimony denying those approvals, elicited by the government, was heavily impeached. Indeed, former Illinois Governor James Thompson—the chairman of the Audit Committee and leader of one of the world's largest law firms—repeatedly claimed at trial that he missed these statements in multiple drafts of the filings, which he signed under penalty of perjury, because he didn't pay much attention to what they said. App., *infra*, 177a; *see also id.* at 163a (Burt) (independent director claimed he read only what management suggested); *id.* at 169a (Kravis) ("I must have missed it").

Hollinger's board (including each Audit Committee member) had approved the Forum/Paxton sales, and had authorized non-compete agreements between the purchasers and Hollinger's "executive officers." App., *infra*, 323a-341a. But the government contended that the approvals violated Delaware law, because these were "related party transactions" that should have been presented initially to the Audit Committee, rather than the Executive Committee, as had occurred. *Id.* at 58a-59a.

As it turned out, the officers did not sign agreements with Forum/Paxton. Although the government claimed the money was therefore stolen, Radler

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[Footnote continued from previous page]

included in the pending Forum/Paxton and CNHI deals. App., *infra*, 321a-322a.

testified that Kipnis simply forgot to draft agreements for inclusion with the closing documents. App., *infra*, at 188a-189a. Radler called Kipnis shortly after the Forum/Paxton sales closed and asked about money for individual non-competition covenants. Kipnis responded that money had not been specifically reserved for that purpose, but that unallocated funds were available in the reserve account. *Id.* at 185a-186a. When Radler directed individual noncompetition payments from that reserve, he believed that the agreements themselves had been executed, consistent with the earlier board approval. Not until two years later, during a special board committee investigation, did Radler learn that Kipnis had never prepared the agreements. *Id.* at 188a-189a. Because there was no intent to steal, petitioners contended, payments accepted under the mistaken belief that agreements had been executed were not theft.

b. The government's evidence on obstruction was even thinner. It was undisputed (indeed, there was film) that Black moved 13 boxes of personal possessions from his office with the help of his assistant and chauffeur. The question was *why* he did so. The government contended it was because the SEC had advised one of Black's lawyers, just the day before, that a subpoena was forthcoming. The SEC investigation had been ongoing for over a year, however, and this would be the government's *sixth* request for documents. The government stipulated that Black had produced 112,000 pages in compliance with all earlier requests. App., *infra*, 356a. Since this conduct did not bespeak a burning compulsion to impede the long-pending investigations (by the SEC and a grand jury), the government repeatedly suggested that Black's real fear was a future criminal prosecu-

tion.[3] In the government's telling, Black somehow learned of the latest document request and, fearing imminent criminal prosecution, decided to make off with the boxes after hours while, unbeknownst to him, a "new" system of security cameras captured his every move. *Id.* at 286a-287a.

Black's detailed cross-examination of the government's witnesses established, however, that the events occurred in broad daylight, in a building full of people; that the purportedly "new" security consisted of updating the recording and playback capabilities of pre-existing surveillance systems, installed while Black was in charge, that continued to film the very same areas; and that anyone of a mind to remove documents from the building could have placed them in a briefcase and walked out without fear of hindrance or detection. App., *infra*, 207a-219a.

Black also put on an extensive defense case demonstrating good reason for moving his effects: He had received his eviction notice six weeks earlier. With the deadline for removing 27 years' worth of accumulated possessions expiring six business days later, his assistant had already spent several weeks packing. App., *infra*, 236a-239a, 351a-353a.

Black had already given his attorneys the run of his office and houses to look for and produce materials responsive to earlier requests; indeed, every document in the Toronto office had been reviewed and

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[3] In examining defense witnesses, the government emphasized that SEC and grand jury inquiries are just a warm-up for a criminal prosecution, and made a point of asking repeatedly if Black had hired criminal defense attorneys. App., *infra*, 224a-226a, 231a-235a, 252a-254a, 259a-262a.

copied by his lawyers at Sullivan & Cromwell. App., *infra*, 240a-241a, 264a-266a. Testimony from several witnesses demonstrated that Black was not told of the new SEC request until the following week. *Id.* at 220a-222a, 228a-230a. Even so, the only item from the entire 13 boxes that the government has ever identified as relevant—a copy of the APC agreement—was the *first* document produced by Black, over a year earlier; it bears a Bates number "CMB 00001." *Id.* at 224a. The other boxes contained personal effects, such as the estate papers for Black's deceased brother. *Id.* at 257a-258a.

2. In keeping with the charges they brought, the prosecution consistently made clear during trial, in framing the jury instructions, and in summations, that the "honest services" charge was an independent (and easier) basis for conviction. Indeed, before jury selection, defense counsel asked that the "honest services" allegations be stricken if merely an alternative label for theft. The prosecutor objected, arguing that the case was "about more than money" because "what these men did was violate the trust that was put in them. So, the government will argue both theories, and the government believes that both theories are equally important." App., *infra*, 134a; *see also id.* at 156a, 303a.

a. The court charged the jury that the honest-services and theft theories of fraud were "different." App., *infra*, 306a. The court extensively defined the former charge solely by reference to the "duty of loyalty" that petitioners owed Hollinger under Delaware law. *Id.* at 307a-308a. Petitioners were guilty of "honest services fraud" if they obtained any "private gain" while failing to act in Hollinger's "best interests." *Id.* at 306a-307a. The jury was told, in that

regard, to consider whether the circumstances surrounding each transaction were "entirely fair," and "whether or how the transaction was disclosed to the directors; and whether or how the approvals of the directors were obtained." *Id.* at 308a.

Petitioners unsuccessfully requested an instruction precluding conviction on the honest-services theory if petitioners had intended no pecuniary harm to Hollinger. App., *infra*, 135a-136a. The jury was told instead that the "intent to defraud" necessary for this theory was that petitioners intended "to deprive" Hollinger of "honest services." *Id.* at 309a. This meant that petitioners "intended to defraud" if they "knew" they were not disclosing what the government asserted should have been disclosed. *Id.* at 307a-309a.

Importantly, the jury also received count-specific instructions on unanimity. For the obstruction charge, the jury needed to "unanimously agree on which" of three "official proceedings, if any, Black intended to obstruct": (1) an SEC investigation into the non-competes, (2) a grand jury investigation of the same, or (3) the criminal fraud case. App., *infra*, 315a.

With respect to mail fraud, however, unanimity was required only on *whether* a "scheme to defraud" existed, not on *which theory* ("honest services" or "theft") supported that element. A guilty verdict was therefore possible even if no juror even considered the "theft" theory, or if different jurors were persuaded by different theories. App., *infra*, 270a-272a, 305a-309a.

b. The prosecution took full advantage of the roadmap provided by the instructions and information (both of which the jury had during deliberations)

to remind the jurors at every turn that petitioners' "duty of loyalty" to Hollinger was an independent, and sufficient, basis for conviction under the "honest services" rubric. App., *infra*, 274a, 276a-277a, 280a-282a; *see also id.* at 297a ("[Y]ou won't see 'lie' defined in the jury instructions .... You'll see 'honest services.'"). Indeed, the government had one key point to make in its final words to the jury: "[W]hen you go back into the jury room, ladies and gentlemen, I have one request .... [T]hink of those two words. Think of 'honest services.' And ask yourself, when you consider each transaction, whether that is what the shareholders received." *Id.* at 300a.

3. The jury acquitted on the bulk of the charges, including the majority dealing with non-competes, each alleged abuse of "perks," the charge that Hollinger understated its tax liability by not including as part of its income the money that petitioners "stole," and the fraud-based RICO charge against Black. (The government had dismissed the money laundering count at the close of its case.) The jury returned guilty verdicts on just four counts: two counts charging fraud on the basis of non-compete agreements with Hollinger subsidiary APC (counts 1 and 6); one of the three Forum/Paxton fraud counts (count 7); and Black's obstruction charge.

4. On appeal, the government invoked the doctrine of "inconsistent verdicts," urging the court to disregard the acquittals and assess only the evidence favoring conviction in its most favorable light. Gov't C.A. Br. 32-33 (2008). The Seventh Circuit acknowledged that the evidence was conflicting and inconsistent, but accepted that the jury could legally have rested its verdict on the government's version of events. App., *infra*, 19a ("Or so the jury was entitled

to find; the evidence was conflicting"). The court also rejected petitioners' objections to the jury charge on honest services but held, in the alternative, that petitioners forfeited their objections by opposing special verdicts. *Id.* at 26a-27a.

D. This Court's Decision and the Seventh Circuit's Ruling on Remand

This Court unanimously reversed the Seventh Circuit's honest-services and forfeiture rulings.

1. The Court held that petitioners' objections to the honest-services instructions complied with the federal rules, which left no room for additional forfeiture rules based on petitioners' rejection of a special verdict. The Court also concluded that the instructions on honest services "were indeed incorrect," because honest-services fraud is limited to bribe or kickback schemes, and "[t]he scheme to defraud alleged here did not involve any bribes or kickbacks." *Black* v. *United States*, 130 S. Ct. 2963, 2968 n.7, 2970 (2010). The Court remanded for consideration of the government's claim that "the error was ultimately harmless," expressing "no opinion on the question." *Id.* at 2970 & n.14.

2. On remand, the government contended that the error was harmless because there was "overwhelming evidence" of theft and obstruction. It again relied on the inconsistent verdicts caselaw to urge the irrelevance of the acquittals, embracing a sufficiency-of-the-evidence approach that touted only the evidence supporting its theories. Gov't Remand Br. 4-10; Gov't En Banc Opp'n 7. Petitioners urged that *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny required the court to focus on the effect of the erroneous instruction on the jury that actually heard the case, and to vacate the convictions if there

was any reasonable possibility that the error might have contributed to the verdict. In light of the general verdict, the defense evidence, and the sweeping acquittals, petitioners contended, the government could not prevail.

The Seventh Circuit accepted the government's methodology, but not its every conclusion. Writing for the court, Judge Posner noted that the general verdict meant "we cannot be absolutely certain that [the jury] found the defendants guilty of pecuniary fraud as well as, or instead of, honest services fraud." App., *infra*, 2a. "But," he added, "if it is not open to reasonable doubt that a reasonable jury would have convicted them of pecuniary fraud, the convictions on the fraud counts will stand." *Id.* at 3a (citing, *inter alia*, *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), and *Neder* v. *United States*, 527 U.S. 1 (1999)).

The court "barely" vacated the APC counts (1 and 6) after rehearsing at length the prosecution's evidence of "theft," but without adverting to any contrary arguments or evidence—not even the fact that Radler, *testifying for the government*, consistently swore the money was not stolen. App., *infra*, 14a. Instead, the court vacated those counts because "all that the jury had to find" to convict of honest-services fraud was petitioners' "failure to level with the board and the audit committee, which was irrefutable." *Id.* at 10a.

Although identical instructions, and the parallel language of the information, also permitted the jury to find guilt on Forum/Paxton (count 7) solely for petitioners' "failure to level" with the Audit Committee, the court reached a different conclusion as to count 7. The court asserted that the failure-to-disclose theory

was mentioned only "in passing in the information" and emphasized the government's evidence and arguments on pecuniary fraud—again, without adverting to contrary evidence or arguments.

The court found the defense on count 7—that covenants were approved but undocumented due to an innocent oversight by Kipnis—"decisively unbelievable," because (1) petitioners "could have no interest in going into competition" with such "small newspapers," (2) Forum/Paxton witnesses offered "disinterested" testimony that they did not request covenants, and (3) Radler's contemporary memorandum reflecting that the owners did request them was "clowning" and an "implicit boast that the covenants were fabrications." App., *infra*, 11a-13a. The court concluded that "the evidence of pecuniary fraud is so compelling that no reasonable jury could have refused to convict." *Id.* at 13a-14a.

The court also affirmed Black's obstruction conviction. The court conceded that "copies of the documents" in Black's office were already "available to the government," but (disregarding that this was so because Black himself had produced them) speculated that Black might have tried to deny he had copies. App., *infra*, 4a. The court found "compelling evidence" that Black knew he was being investigated "by a grand jury and by the SEC." *Ibid.* According to the court, "[t]he evidence that the boxes were removed in order to conceal documents from the government investigators was compelling, even though Black's secretary loyally testified that Black intended to remove the documents to a temporary office . . . because he had to vacate his office at Hollinger within ten days." *Id.* at 5a. Finally, the court denied that the honest-services instruction was "apt

to poison the jury's consideration of" the obstruction charge, because the evidence on honest services was "esoteric" and "[n]o reasonable jury could have acquitted Black of obstruction if only it had not been instructed on honest services fraud." *Id.* at 6a.

The court also suggested forgoing retrial on the vacated APC counts and instead seeking, on the affirmed counts, the sentences already imposed before this Court vacated the judgment below. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The opinion below deepens two substantial splits in the lower courts over the application of harmless-error review in the wake of *Neder* v. *United States*, 527 U.S. 1 (1999).

First, the circuits are divided on how such review should be conducted when jury instructions allow conviction for both unlawful and lawful conduct. The Seventh Circuit's approach—also followed by the Eighth Circuit—deems such an error harmless if a hypothetical rational jury "would have" credited the prosecution's "overwhelming" evidence on the legally *valid* theory. By contrast, the Tenth and Eleventh Circuits require the government to establish that the legally *invalid* theory did not affect the jury's verdict; they reject reliance on purportedly "overwhelming" evidence on the valid theory as inconsistent with *Stromberg* v. *California*, 283 U.S. 359 (1931), and *Yates* v. *United States*, 354 U.S. 298 (1957).

Second, the lower courts are divided on whether, even outside the alternative-theory context, *Neder* fundamentally revamped harmless-error review by rejecting this Court's traditional focus on the verdict "obtained" and the error's effect "upon the guilty ver-

dict in the case at hand," *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993), in favor of an abstract inquiry into whether "overwhelming evidence" supports the result. *Compare State* v. *Alvarez-Lopez*, 98 P.3d 699, 708-10 (N.M. 2004) (rejecting "overwhelming evidence" test), *and Cooper* v. *State*, 43 So. 3d 42, 43 (Fla. 2010) (same), *with People* v. *Nitz*, 848 N.E.2d 982, 991 (Ill. 2006) (*Neder* requires inquiry into "what a rational jury would have found," not "specula[tion] as to the motivations of the 12 men and women empaneled to decide defendant's case").

The Seventh Circuit's decision starkly illustrates the confusion in the lower courts following *Neder*. Although there is more than a reasonable likelihood that the jury convicted petitioners for conduct that is not a crime, the Seventh Circuit purported to "cure" this due process violation by violating the Sixth Amendment: The judgment was affirmed because, in the estimation of three judges, the evidence supporting the defense was incredible, and a "reasonable jury" faced with the prosecution's "overwhelming" evidence surely would have convicted on the Forum/Paxton and obstruction charges—indeed, a jury "could not refuse" to do so.

This radical application of the "overwhelming evidence" approach lays bare its constitutional weakness, because *this jury* was unpersuaded by much of the same prosecution evidence. It has long been settled that appellate courts may not make credibility judgments under the guise of harmless-error review, *Weiler* v. *United States*, 323 U.S. 606, 611 (1945), that the government bears the burden of establishing harmlessness beyond a reasonable doubt, *e.g.*, *Gamache* v. *California*, 131 S. Ct. 591, 592-93 (2010) (statement of Sotomayor, J.), and that, "regardless of

how overwhelmingly the evidence may point in that direction," no court may direct a verdict for the government, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

The analysis below is based on a serious misreading of *Neder*, and it effectively attributes to this Court a sharp, unexpected, and inexplicable detour from a steady line of decisions protecting the jury trial right in Article III and the Sixth Amendment. *See, e.g.*, *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). If left unreviewed, the Seventh Circuit's abrogation of this fundamental right portends further division and confusion on a crucial and widely used doctrine that today "stands as the inevitable last resort of government lawyers—and, too often, . . . of appellate judges." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1173 (1995).

I. THE SEVENTH CIRCUIT'S DECISION MISCONSTRUED *NEDER* AND IS CONTRARY TO THE SIXTH AMENDMENT.

A. This Court previously ruled that the jury instructions authorized petitioners' convictions for something that is not a crime, because the honest-services charge encompassed purported fiduciary breaches that are neither bribes nor kickbacks. If the verdict was based on this instruction, it unquestionably violates due process. *Carella* v. *California*, 491 U.S. 263, 265 (1989) (per curiam) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

As *Stromberg* and *Yates* make clear, "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, be-

cause the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983). The instructions in this case are plagued by precisely this sort of "*Yates* error." Indeed, not only was honest services a fully *independent* basis for conviction, the unanimity instruction allowed it to be a *partial* basis for the verdict, as well. *Cf. Zant*, 462 U.S. at 881-82 (*Yates* also applies if a count is based on *both* legal and illegal grounds).

Hedgpeth v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), held that *Yates* errors differ from "structural" errors—such as defective reasonable-doubt instructions or a biased judge—whose precise effects are unknowable, making them never susceptible to harmlessness review. *See United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006); *Sullivan*, 508 U.S. at 281. Alternative-theory error is not structural, *Pulido* reasoned, because a court can analyze the risk of harm from the *erroneous* part of a multiple-legal-theory instruction just as it can if no "good" theory is instructed at all. 129 S. Ct. at 532. *Pulido* held that it would be "patently illogical" to hold that giving the jury "both a 'good' charge and a 'bad' charge" on an issue is "somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one." *Ibid.*

Pulido did not alter the *test* for harmless error; that test remains controlled by pre-existing caselaw. Nor did *Pulido* overrule or modify the *Stromberg-Yates* rule. It merely placed the *flawed* prong of alternative-theory error on the same footing as other instructional errors. In a case like this, *Pulido* allows the government to retain a conviction by demonstrating under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny that the error in defining

honest services would not have led to reversal if that had been the only theory presented to the jury—by demonstrating, for example, that the verdict necessarily rests on a finding of bribes or kickbacks. If, as here, the government is unable to carry that burden, however, then *Yates* and *Stromberg* control: The convictions must be reversed if the jury could have convicted on the invalid theory.

B. This Court's cases do not support the proposition that an instructional error can be harmless where the prosecution's evidence is so "overwhelming" that some hypothetical "reasonable jury would have convicted" the defendant on an error-free theory. App., *infra*, 3a. *Chapman* requires reversal if there is *any* "reasonable possibility" that an error "might have contributed to the conviction"; the government must establish that the error "did not contribute to the verdict *obtained*." 386 U.S. at 24 (emphasis added).

Thus, under *Chapman*, an error "cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in this fashion would be to dispense with trial by jury." *California* v. *Roy*, 519 U.S. 2, 7 (1996) (Scalia & Ginsburg, JJ., concurring). "[T]he error in such a case is that the wrong entity judged the defendant guilty." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). Indeed, the lower court in *Chapman* had ruled the error harmless because proof of guilt was "overwhelming." 386 U.S. at 23 n.7. This Court rejected that standard as inconsistent with the jury-trial right; although the prosecution's case was "reasonably strong . . . it was also a case in which, absent

[the error,] honest fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 23-24.[4]

To be sure, the strength of the government's case may be *relevant* to a harmless-error inquiry, particularly in cases involving the erroneous admission or exclusion of evidence. *See Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986). Erroneously admitted evidence may be unimportant in the context of everything else the jury heard, though the converse is also true: Some evidence is so powerful that the jury would likely consider little else, regardless of how "overwhelming" the other evidence might seem. *Compare Schneble* v. *Florida*, 405 U.S. 427, 431 (1972) (improperly admitted evidence "at most tended to corroborate certain details" of defendant's properly admitted "grisly" and "comprehensive" confession), *with Arizona* v. *Fulminante*, 499 U.S. 279, 297 (1991) (error in admitting coerced confession not harmless despite State's "overwhelming evidence"); *id.* at 313 (Kennedy, J., concurring). The focus always must remain on the error's likely effect on the jury, and whether "honest, fair minded jurors" could have acquitted, *Chapman*, 386 U.S. at 26, not on the strength of the government's evidence.

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[4] Chief Justice Traynor explained that *Chapman* "expressly rejected this court's reliance on overwhelming evidence to establish harmless error," a rejection "explained only on the theory that a substantial error that might have contributed to the result cannot be deemed harmless regardless of how clearly it appears that the jury would have reached the same result by an error-free route had the erroneous route been denied it." *People* v. *Ross*, 429 P.2d 606, 621 (Cal. 1967) (Traynor, C.J., dissenting). This Court vindicated his view with a summary reversal. *Ross* v. *California*, 391 U.S. 470 (1968) (per curiam).

The same is true for instructional error. An essential premise of harmless-error review is that "jurors are reasonable and generally follow the instructions they are given." *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991) (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)). Thus, although "the harmlessness of an error is to be judged after a review of the whole record," a flawed instruction may "so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing" that charge. *Id.* at 405.

"To satisfy *Chapman*'s reasonable-doubt standard," therefore, it is not "enough that the jury considered evidence from which it could have come to the verdict without" the error, because this "will not tell us whether the jury's verdict *did rest* on that evidence." *Evatt*, 500 U.S. at 404, 407 (emphasis added); *see also Bihn* v. *United States*, 328 U.S. 633, 638-39 (1946). As this Court noted in *Sullivan*, the proper inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." 508 U.S. at 279; *see also Pope* v. *Illinois*, 481 U.S. 497, 503 n.6 (1987).

C. *Sullivan* also suggested that the absence of a jury verdict on every element of an offense can *never* be harmless. *Neder* concluded that this part of *Sullivan* swept too broadly, 527 U.S. at 11, but it did not question (much less overrule) either *Sullivan*'s holding that harmless-error review must focus on the error's effect on the actual verdict or *Chapman*'s emphasis on assessing whether a fair-minded jury could have acquitted.

Neder chose not to contest the materiality element in a tax prosecution, and the trial judge did not instruct the jury on it, mistakenly believing materiality to be a question of law. This Court concluded that the error was not structural and that a failure to instruct on an element is harmless under *Chapman* if the evidence is overwhelming *and* the element is undisputed. 527 U.S. at 16-17. Although four Justices thought this analysis improperly diluted the showing required for harmlessness, the Court homed in on the fact that *Chapman* requires a focus on the "verdict obtained." *Id.* at 15.

Neder reasoned that a failure to instruct on a proposition never questioned by the accused at trial, and on which the evidence was overwhelming, could not possibly have influenced the verdict. 527 U.S. at 15-17. But the Court expressly reaffirmed the right of the accused not to suffer a directed verdict on a *contested* element, *id.* at 17 n.2, and it emphasized that "safeguarding the jury guarantee" still requires "a thorough examination of the record," *id.* at 19. "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," this Court concluded, "the court . . . should not find the error harmless." *Ibid.*

Indeed, any contrary reading of *Neder* would be inconsistent with this Court's assessment of whether particular errors are "structural"—a practice this Court has continued after *Neder*. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148-51. Even dispensing with reasonable doubt could be made to seem "harmless" in some sense because an appellate court can always assess whether the government's evidence "would have" satisfied a "reasonable jury" correctly apprised of the government's burden.

D. The Seventh Circuit's analysis cannot be reconciled with this Court's focus on whether the jury was presented with evidence that could have led to acquittal. To the contrary, its assessment of the supposed strength of the government's case ignored or ridiculed all evidence that favored the defense, recited remaining evidence in the light most favorable to the prosecution and, other than to misstate them, ignored the acquittals.

1. The large number of acquittals—including nine counts of fraud and multiple other charges predicated on "theft"—demonstrates that *this jury* found the government's case so underwhelming that it was unprepared to accept it even when given the option to convict on something (fiduciary nondisclosure) that is *not* a crime.[5] As this Court noted in *Olden* v. *Kentucky*, acquittals "cannot be squared with the [government's] theory of the alleged crime" and powerfully demonstrate that the government's evidence "was far from overwhelming." 488 U.S. 227, 233 (1988); *see also United States* v. *Acker*, 52 F.3d 509, 518 (4th Cir. 1995); *United States* v. *Price*, 13 F.3d 711, 730 (3d Cir. 1994); *United States* v. *Slade*, 627 F.2d 293, 308 (D.C. Cir. 1980).

Yet in a case in which the jury largely rejected the testimony of the government's witnesses, the Seventh Circuit ruled the same testimony so "compelling" that no jury "could refuse" to convict. Indeed, the court vacated the APC counts—"barely," App., *infra*, 14a—without even adverting to the gov-

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[5] The jury could *convict* on fraud without even considering the theft charge, but it could *acquit* only after considering—and rejecting—*both* of the government's theories of fraud.

ernment's own star witness, who refuted the "theft" claim at trial. Quite simply, the Seventh Circuit did not hold the government to its burden under *Chapman*. It did not even try.

The Seventh Circuit also did not address the jury instructions when reviewing count 7. But such a review is essential under this Court's cases, because courts must presume the jury followed those instructions. Here, the instructions make clear that (1) the "honest services" charge was so much easier for the government that no juror needed even to *consider* "theft" in order to convict petitioners of fraud, and (2) the unanimity instruction means that the error could not possibly be harmless unless the government establishes that not a single juror took that route.

In affirming count 7, the Seventh Circuit focused, not on whether *this jury* could have acquitted, but on what a hypothetical properly instructed "reasonable jury" would do if faced with the government's best spin on its own evidence. For example, the court did not mention, much less discuss, the many acquittals that necessarily rejected the government's "theft" theories. The one exception was the acquittals on counts 2 and 3, which—like count 7—involved the Forum/Paxton sales. The court distinguished those on the theory that the covenants in counts 2 and 3 were with "Hollinger," which it viewed (unlike the individuals) as a credible competitor.

But the "Hollinger" in those counts was *Inc.*, the Canadian holding company, not Hollinger International, the publishing empire. The information's theory was that Inc. was just as implausible a competitor as the individuals. Most importantly, both of the Forum/Paxton witnesses gave the same testi-

mony as to all three counts: that they neither requested nor needed covenants from Inc. or the officers. Had the jury found those witnesses as credible and "disinterested" as the Seventh Circuit did, it would have convicted on all three counts.

The remainder of the court's analysis is similarly infirm. The court not only ignored Radler's exculpatory testimony that petitioners were unaware of Kipnis's oversight when the Forum/Paxton money was paid, but also derided the probative value of his contemporary memorandum confirming that individual non-competes had been requested. The facts recited by Radler were confirmed by a different memorandum from Kipnis, and the jury acquitted on other counts based on the same evidence and arguments—particularly count 5, which involved a CNHI transaction also described in Radler's memorandum.

Reviewing the same evidence in the light most favorable to the government, however, the court concluded that Radler's use of humor amounted to a confession that the covenants were "fabrications." App., *infra*, 13a. A properly instructed jury *might* conclude that Radler was letting petitioners in on a fraud merely because one part of his memorandum was tongue-in-cheek, but an appellate court cannot conclude, on that basis, that a jury *must* find that the memorandum means the opposite of what it actually says. The jury credited petitioners' defense on several similar charges. Once this Court ruled that the remaining convictions are infected with constitutional error, it was wrong for the Seventh Circuit to review the record in the light most favorable to the government.

2. The Seventh Circuit's analysis of the obstruction conviction suffered from similar flaws and more.

The obstruction statute requires the government to show that the defendant *corruptly* impeded some *underlying* "official proceeding" that was then pending or that he reasonably contemplated. This includes not only a "wrongful intent" but also a "nexus": To convict a defendant of obstructing justice, "the [obstructive] act must have a relationship in time, causation, or logic with the judicial proceedings." *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995). Thus, to establish the "corrupt" intent required by the statute, the government had to prove that Black "contemplat[ed]" a "*particular official proceeding* in which those documents might be material." *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 708 (2005) (emphasis added).

The Seventh Circuit emphasized that SEC and grand jury proceedings were pending when Black's assistant packed up his belongings to be moved. This, however, is irrelevant if the jury's verdict instead was based on the third choice offered up as an obstruction object: the prosecution in this case, which then was only "contemplated." The government, faced with mountains of evidence showing Black's compliance with each investigation that *did* exist, touted interference with this prosecution as the most plausible motive for alleged obstruction.

Given that theory, the erroneous instructions on honest-services fraud naturally would sway the jury toward conviction. The instructional error—which told the jury that a vast range of conduct involving fiduciary nondisclosure was criminal—greatly improved the plausibility of the government's claim that Black had much to fear. Indeed, this Court curbed the government's expansive use of honest-services prosecutions precisely because, under the

government's sweeping theory, rare would be the citizen who was not at risk of prosecution.

It is no answer to say, as the Seventh Circuit reasoned, that the then-pending investigation (and ultimate criminal indictment) also embraced pecuniary fraud, which *is* a crime. App., *infra*, 6a-8a. That might suggest how a proper obstruction charge *could* have been framed, but it does not show that *this jury* found obstruction on a proper basis. When a jury may have rested its verdict on an erroneous view of the *law*, it is never a good answer to say that the jury had available *other* legally sound theories on which a verdict could have rested. *Compare Yates*, 354 U.S. at 311-12, *and Bachellar* v. *Maryland*, 397 U.S. 564, 569-72 (1970), *with Griffin* v. *United States*, 502 U.S. 46, 59 (1991).

The government presented a weak, heavily circumstantial—and compellingly impeached—case on the key elements of corrupt-motive and nexus. The defense severely hobbled the government's theories on both elements, and presented a far more reasonable (and innocent) explanation for the removal of the boxes. Faced with this conflicting evidence, the jury—clearly unpersuaded by the government's "looting" allegations—had only its flawed understanding of the crime that Black purportedly was motivated to impede to sway it toward conviction. The government could not remotely meet the burden that this Court's precedents demand: to negate this possibility beyond a reasonable doubt.

II. The Lower Federal And State Courts Are Deeply Divided On The Applicable Standard For Harmlessness After *Neder*.

Neder has led to substantial confusion in the lower courts, both in the context of alternative-

theory error and, more generally, in cases involving the harmlessness of myriad other constitutional errors.

A. The Tenth and Eleventh Circuits hold that courts dealing with alternative-theory errors cannot affirm, as the Seventh Circuit did here, on the ground that the government presented strong evidence of guilt on the "good" theory. In *United States* v. *Holly*, 488 F.3d 1298 (10th Cir. 2007), a sheriff was convicted of civil-rights violations on instructions that permitted conviction if he used either force or fear to subdue his victims; the fear instruction was defective. The Tenth Circuit noted that the harmless-error inquiry "must focus exclusively on the erroneously instructed 'fear' element," because a "court may not affirm a conviction based solely on overwhelming evidence of the properly instructed ground." *Id.* at 1307 & n.6. "Reliance on the valid ground, without an actual jury finding, too closely resembles a presumption that the jury relied on that ground, thus undermining even the most narrow applicability of *Stromberg*." *Id.* at 1307 n.6; *see also United States* v. *Holland*, 116 F.3d 1353, 1358 (10th Cir. 1997) (sufficiency of the evidence on valid theory not enough).

Similarly, "[t]he Eleventh Circuit has concluded that in a *Stromberg*-type case, the reviewing court may not consider whether the strength of the evidence on the valid theory submitted to the jury is sufficient to render harmless the error of instructing the jury on an alternative theory." *Becht* v. *United States*, 403 F.3d 541, 546 (8th Cir. 2005) (discussing *Adams* v. *Wainwright*, 764 F.2d 1356, 1362 (11th Cir. 1985)). "If the law were otherwise," the Eleventh Circuit explained, "the rule of *Stromberg* would be

eviscerated." *Parker* v. *Sec'y for the Dep't of Corr.*, 331 F.3d 764, 778 (11th Cir. 2003). Indeed, *Parker* concluded that state courts had violated clearly established federal law in reasoning that an erroneous theory of conviction could be rendered "harmless" by "overwhelming evidence" that supported a different theory. *Id.* at 779.

By contrast, the Eighth Circuit in *Becht* concluded that, in cases like *Stromberg* and *Yates*, a conviction may be "affirmed if the trial record established guilt beyond a reasonable doubt" under the *valid* "alternative theory." 403 F.3d at 548. Becht had been convicted of possessing child pornography. The charge permitted conviction if the images were, or appeared to be, those of children. Congress had enacted the "appear to be" standard to criminalize computer-generated images of "virtual" children, but this Court declared it unconstitutional in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The Eighth Circuit conceded that "*Stromberg* prevents a reviewing court" from upholding the conviction "merely because the evidence was *sufficient* to support the [valid] ground." 403 F.3d at 548. Nonetheless, like the Seventh Circuit, the court upheld the conviction because its own review of the evidence persuaded it that the images supported the valid alternative—actual, rather than virtual, children. *Id.* at 549.

B. The conflicting approaches to harmless-error review adopted by the courts of appeals in the context of alternative-theory error are alone sufficient to warrant this Court's review. But *Neder*'s invocation of the "overwhelming evidence" rubric has sown even broader confusion in the lower federal and state courts: It has fueled a dispute on the extent to which

appellate courts may excuse errors as "harmless" based on their perceived effect on hypothetical juries or on the courts' own assessments of the strength of the evidence.

1. The Second Circuit, for example, has held that failure to charge the jury on a contested element of the crime can be harmless—even if the jury *could* have found for the defendant based on the evidence—if the court believes a properly instructed jury *would* have convicted. *United States* v. *Jackson*, 196 F.3d 383, 389 (2d Cir. 1999). As a later panel of the same court noted, allowing "the court to decide on its own whether the jury would have convicted the defendant, even where the evidence can support a finding in the defendant's favor," is in "some tension" with *Neder*. *Monsanto* v. *United States*, 348 F.3d 345, 350-51 (2d Cir. 2003) (Calabresi, J.).

The Fourth Circuit disagrees with the Second Circuit, emphasizing that *Neder* itself instructed lower courts *not* to find an error harmless if "the defendant contested the . . . element and raised evidence sufficient to support a contrary finding." *United States* v. *Brown*, 202 F.3d 691, 701 & n.19 (4th Cir. 2000). In striking contrast with the Seventh Circuit's methodology here—and in keeping with the heavy burden *Chapman* places on the government—the Fourth Circuit canvassed the record for evidence that *undermined* the government's case.[6] It concluded that the defendant "genuinely

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[6] *Accord United States* v. *Hands*, 184 F.3d 1322, 1330-31 & n.23 (11th Cir. 1999) (court must consider factors affecting credibility of the government's case); *United States* v. *Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (error not harmless when prosecution and defense witnesses "gave a plausible account,"

[Footnote continued on next page]

contested the evidence supporting [the government's case], and there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the Government's witnesses." *Id.* at 702. "Put simply," the court reasoned, "the Government's case turned upon the credibility of witnesses whose vulnerabilities were exposed by [the defense], and we are unable to discern which of these witnesses were actually believed and relied upon by the jury." *Ibid.*

2. A similar dispute has unfolded among state courts of last resort. In a decision authored by one of the judges who affirmed the convictions below, the Supreme Court of Wisconsin concluded in *State* v. *Harvey*, 647 N.W.2d 189 (Wis. 2002) (Sykes, J.), that a trial court committed constitutional error in taking judicial notice on one of the elements of a sentencing enhancement: whether the offense occurred near a "city park." But while no evidence was introduced on that element—indeed, the defendant had moved for a directed verdict on this basis—the court ruled the error harmless under *Neder* because "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable: Penn Park is a city park, and no one says otherwise." *Id.* at 202.

Under this analytical framework, an accused may not rely on the presumption of innocence or the fact that the jury heard no evidence at all on an element. An omitted element may be viewed as "uncontested and supported by overwhelming evidence" un-

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[Footnote continued from previous page]

neither of which "was *inherently* unlikely to be true," because "we are precluded from making independent credibility determinations on appeal").

der *Neder* .o long as reference materials available to the appeliate court establish it. *See Harvey*, 647 N.W.2d at 203 (Crooks, J., concurring) (noting court's abandonment of "reasonable possibility" standard); *id.* at 207 (Abrahamson, J., dissenting) (decrying abandonment of *Chapman*); *see also State* v. *Hale*, 691 N.W.2d 637, 651 (Wis. 2005) (Abrahamson, J., concurring). Other courts likewise treat *Neder* as having superseded this Court's earlier caselaw mandating a focus on the particular jury that heard the case. *See Nitz*, 848 N.E.2d at 990-91; *People* v. *Rivera*, 879 N.E.2d 876, 888 (Ill. 2007) (reaffirming *Nitz*), *aff'd on other grounds*, 129 S. Ct. 1446 (2009); *People* v. *Shepherd*, 697 N.W.2d 144, 146-47 & n.6 (Mich. 2005) (per curiam).

By contrast, several state courts of last resort do not read *Neder* as superseding the rule that "[h]armless error review looks to the basis on which the jury actually rested its verdict." *Lowry* v. *State*, 657 S.E.2d 760, 765 (S.C. 2008) (citing *Sullivan*, 508 U.S. at 279). And others have "explicitly rejected the overwhelming evidence test as a proper analysis of harmless error." *Ventura* v. *State*, 29 So. 3d 1086, 1091 (Fla. 2010) (per curiam) ("the test" is "whether there is a reasonable possibility that the error affected the verdict" (emphasis omitted)); *see also Cooper*, 43 So. 3d at 43; *Rigterink* v. *State*, 2 So. 3d 221, 256 (Fla. 2009) (per curiam), *vacated on other grounds*, 130 S. Ct. 1235 (2010); *Fields* v. *United States*, 952 A.2d 859, 866-67 (D.C. 2008); *People* v. *Hardy*, 824 N.E.2d 953, 957-58 (N.Y. 2005). As the New Mexico Supreme Court explained, *Neder* "did not indicate disapproval" of *Sullivan*'s "explanation of the *Chapman* harmless error analysis" but instead reaffirmed the right to trial by jury. *Alvarez-Lopez*, 98 P.2d at 708. Given those limitations, a "constitu-

tional error cannot be deemed harmless simply because there is overwhelming evidence of the defendant's guilt. Our focus must remain squarely on assessing the likely impact of the error on the jury's verdict." *Id.* at 709-10.

* * *

Both in the alternative-theory context presented by this case, and in the more general run of criminal cases, the lower courts are hopelessly divided on the extent to which *Neder* abandoned decades of harmless-error precedents that jealously safeguarded a defendant's jury-trial right while forgiving errors that presented little threat to that right. Although the Seventh Circuit is not alone in misreading *Neder* to permit an abstract inquiry into the "overwhelming" nature of the prosecution's case, the ruling below conflicts with the approach of other federal and state courts that have kept faith with this Court's earlier cases—cases that only this Court, and not the lower courts, may abandon. *See Agostini* v. *Felton*, 521 U.S. 203, 237-38 (1997).

The Seventh Circuit's extreme application of the "overwhelming evidence" approach presents an ideal vehicle to review these issues: It transformed *Neder* into a sufficiency-of-the-evidence review that indulged every inference in the government's favor. The decision below, therefore, dispensed not only with the jury that actually heard the case but also with *Chapman*'s insistence that the government, as the beneficiary of an error it created, bear a heavy burden in disproving prejudice. Because the lower courts could not be more divided on these essential and recurring questions—which are of crucial importance to the administration of justice in the lower

state and federal courts—this Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 17, 2011

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-4080, 08-1030, 08-1072, 08-1106

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 05 CR 727—**Amy J. St. Eve**, *Judge.*

ARGUED SEPTEMBER 29, 2010—
DECIDED OCTOBER 29, 2010

Before POSNER, KANNE, and SYKES, *Circuit Judges.*

POSNER, *Circuit Judge.* This case is before us for the second time, the Supreme Court having vacated

the judgment, which we had affirmed, and remanded the case to us for reconsideration. *Black v. United States*, 130 S. Ct. 2963 (2010).

The defendants—senior executives of Hollinger International—had been convicted by a jury of three counts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1342, and defendant Black had also been convicted of obstruction of justice, in violation of 18 U.S.C. § 1512(c). The judge had sentenced Black to a total of 78 months in prison, Atkinson and Boultbee to 24 and 27 months, and Kipnis to probation with six months of home detention.

The three fraud counts (which we'll treat as two, because two of the three relate to transactions with the same company, APC) were submitted to the jury under two theories: that of a scheme of fraudulent appropriation of money to which Hollinger was legally entitled (we'll call this "pecuniary fraud"), and that of a scheme to deprive Hollinger of the latter's "intangible right of honest services," 18 U.S.C. § 1346, amending sections 1341 and 1342. The first theory required that the defendants have obtained a pecuniary benefit at the expense of Hollinger; the second did not; and because the jury returned a general verdict on the fraud counts, we cannot be absolutely certain that it found the defendants guilty of pecuniary fraud as well as, or instead of, honest-services fraud.

After we affirmed, the Supreme Court held that the latter form of fraud requires proof that the defendant(s) received a bribe or kickback, as otherwise section 1346 would be unconstitutionally vague. *United States v. Skilling*, 130 S. Ct. 2896, 2931 (2010); see *United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010); *United States v. Urciuoli*, 613

F.3d 11, 17-18 (1st Cir. 2010). That was not proved here and so the defendants could not lawfully be convicted of honest-services fraud. But if it is not open to reasonable doubt that a reasonable jury would have convicted them of pecuniary fraud, the convictions on the fraud counts will stand. *Hedgpeth v. Pulido*, 129 S. Ct. 530, 531-32 (2008) (per curiam); see *Neder v. United States*, 527 U.S. 1, 15-16 (1999); *United States v. L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009); *United States v. Cappas*, 29 F.3d 1187, 1192 (7th Cir. 1994); *United States v. Jackson*, 196 F.3d 383, 386 (2d Cir. 1999). "An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Hedgpeth v. Pulido*, *supra*, 129 S. Ct. at 532 (emphasis in original).

The case would still have to be remanded to the district court for resentencing unless it was reasonably certain that the judge would have imposed the same sentences even if the charge of honest-services fraud had not been submitted to the jury. Suppose no reasonable jury would have failed to find pecuniary fraud. Nevertheless that same jury, having been instructed on honest-services fraud, might have found the defendants guilty of honest-services fraud as well. The judge would then have been incorrectly sentencing the defendant for two crimes rather than one. She might think honest-services fraud the more serious crime, or at least that it made the defendants' conduct more reprehensible and so merited heavier overall sentences.

We begin with defendant Black's argument that the submission of that charge to the jury contami-

nated his conviction of obstruction of justice, and that therefore he is entitled to a retrial on the obstruction count as well as on the fraud counts. He was charged with having concealed or attempted to conceal documents "with the intent to impair the [documents'] integrity or availability for use in an official proceeding," in violation of 18 U.S.C. § 1512(c)(1). There was compelling evidence that he knew that the acts that later formed the basis of the fraud charges against him and his codefendants were being investigated by a grand jury and by the SEC. In the midst of these investigations Black with the help of his secretary and his chauffeur removed 13 boxes of documents from his office, put them in his car, was driven home, and helped carry them from the car into his house.

He later returned the boxes; and copies of the documents were available to the government before the boxes were removed; but it was material to the investigation whether Black had had copies in his office. For that would mean that he had received them and might know they were material to the government's investigation. Furthermore, the boxes may have contained documents, of which there were no copies, that he'd removed before returning the boxes. That is speculation; but the possibility of such tampering helps to explain why the obstruction statute does not require proof of obstruction, as distinct from intent to obstruct, in order to convict. The usual consequence of an obstruction of justice is not that a guilty person is acquitted but that the government expends additional resources to prevent the effort at obstruction from succeeding, as in our case of *United States v. Wells*, 154 F.3d 412, 414-15 (7th Cir. 1998), where the defendant's lie about the proceeds of his robbery sent the police on a wild goose

chase. Similarly, concern that a suspect may be concealing material documents incites additional investigative efforts by the government. See *United States v. Tankersley*, 296 F.3d 620, 62324 (7th Cir. 2002).

Thus, as we explained in a portion of our first opinion not disturbed by the Supreme Court and therefore the law of the case, the obstruction of justice statute does not require proof of materiality unless the alleged obstruction takes the form of a lie that could not be expected to have any effect on the justice process. *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999). Being able to deny the materiality of a document is a common reason for concealment. So it is enough for conviction that a document was concealed in order to make it unavailable in an official proceeding. See, e.g., *United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002); *United States v. Philips*, 583 F.3d 1261, 1263-64 (10th Cir. 2009); *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009); *United States v. Lessner*, 498 F.3d 185, 197-98 (3d Cir. 2007). The evidence that the boxes were removed in order to conceal documents from the government investigators was compelling, even though Black's secretary loyally testified that Black intended to remove the documents to a temporary office that she would set up for him in her home because he had to vacate his office at Hollinger within ten days. Her testimony was inconsistent with his having put the boxes in his car (not hers, which was at the scene) and taken them to his home rather than to hers. There was also evidence that in removing the boxes he tried to avoid the surveillance cameras in his office building—unsuccessfully.

In any event, the sufficiency of the evidence to convict Black of obstruction is no longer an open question; and since the jury was separately instructed on obstruction, the fact that it received an erroneous instruction on another count would ordinarily be irrelevant. *United States v. Holtzer*, 840 F.2d 1343, 1349 (7th Cir. 1988). But Black argues that had the jury not been told it could convict him of honest-services fraud, it might well have acquitted him of obstruction of justice. He appeals to cases in which convictions on counts on which the jury was properly instructed were reversed because a count that was later dismissed was so inflammatory that it created a "prejudicial spillover." E.g., *United States v. Lazarenko*, 564 F.3d 1026, 1042-44 (9th Cir. 2009); *United States v. Edwards*, 303 F.3d 606, 639-40 (5th Cir. 2002); *United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2d Cir. 1996). These cases are in superficial tension with our decision in *Holzer* and also in *United States v. Schwartz*, 787 F.2d 257, 264 (7th Cir. 1986), but those are decisions about misjoinder, and hold that the time to sever a trial because of a prejudicial spillover from one count to another is before the trial begins. If a count is submitted to the jury under an instruction apt to poison the jury's consideration of other counts as well, the defendant may be entitled to a new trial.

But this is not such a case. The theory of honest-services fraud submitted to the jury was esoteric rather than inflammatory; the evidence of such fraud was a subset of the evidence of pecuniary fraud; and the evidence of obstruction of justice was very strong. No reasonable jury could have acquitted Black of obstruction if only it had not been instructed on honest-services fraud. It would still have been the case that Black had known he was being investigated for fraud

and could not have known that years later the Supreme Court would invalidate one of the fraud charges. And if he were clairvoyant, he would have known that the other fraud charge—pecuniary fraud—would not be invalidated.

At argument Black's lawyer posed the following amusing hypothetical in an attempt to use the error in the fraud instruction to undermine his client's conviction for obstruction of justice: Suppose the Justice Department launches an investigation of a man suspected of having an affair with Minnie Mouse, and while the investigation is under way the man burns his Disney comics. Although an "official investigation" was pending (and capable of being obstructed) when he destroyed the comics, this could not be construed as an obstruction of justice, because the crime under investigation did not exist and therefore he could not have acted with the corrupt intent necessary for guilt of obstruction. Black's lawyer hoped by this hypothetical case to persuade us that the jury would have interpreted his client's intent in removing the documents differently had it known that the honest-services fraud under investigation at the time was not a crime; it would have been more willing to credit his innocent explanation for his action and conclude that he had not acted with corrupt intent. But Black was not under investigation for an obviously nonexistent crime, such as carnal knowledge of a fictional mouse; he was under investigation for conventional pecuniary fraud as well as honest-services fraud, and besides it was not obvious at the time of his removing the documents that honest-services fraud was a nonexistent crime. Hundreds of persons must have been convicted of it before the Supreme Court, years after Black's act, narrowed it to cases in which the defendant receives

a bribe or a kickback. Black had also to fear—and just as acutely—being prosecuted for pecuniary fraud, as of course he was, and the elements of that crime are unchanged from when he acted.

So the conviction for obstruction will stand. The two fraud counts present a stronger case for ordering a new trial (and for all the defendants, not just Black). The first of these counts concerns a subsidiary of Hollinger called APC, which owned a number of small community newspapers that it was in the process of selling. When it had only one left—a weekly community newspaper serving Mammoth Lake, California (population 7,093 in 2000, the year before the fraud)—defendant Kipnis, Hollinger's general counsel, prepared and signed on behalf of APC an agreement to pay the other defendants, plus another Hollinger executive, a total of $5.5 million in exchange for their promising not to compete with APC for three years after they stopped working for Hollinger. The money was paid. Neither Hollinger's audit committee, which was required to approve transactions between Hollinger's executives and the company or its subsidiaries (such as APC) because of the conflict of interest, nor Hollinger's board of directors, was informed of this transaction.

That Black and the others might start a paper in Mammoth Lake to compete with APC's tiny newspaper there was a ridiculous idea; no one would pay them to promise not to do something they obviously would never want to do. But they argued that really the $5.5 million represented management fees owed them, and that they had characterized the fees as compensation for granting covenants not to compete in the hope that Canada, where a substantial percentage of the management fees had been generated,

might not treat the fees as taxable income. Although Hollinger is a large, sophisticated, public corporation, no document was found to indicate that the $5.5 million expenditure was ever approved by the corporation or credited to the management-fees account on Hollinger's books. The checks were drawn on APC even though there was evidence that the defendants had no right to management fees from that entity, and the checks were backdated to the year in which APC had sold most of its newspapers, the purpose being—or so the jury could find—to make the richly compensated covenants not to compete seem less preposterous.

The evidence was certainly sufficient to prove a pecuniary fraud, see *Cleveland v. United States*, 531 U.S. 12, 1920 (2000); *United States v. Orsburn*, 525 F.3d 543, 546 (7th Cir. 2008); *United States v. Henningsen*, 387 F.3d 585, 589-90 (7th Cir. 2004), and the jury was correctly instructed on the elements of such a fraud. But it was also instructed that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders of their right to the defendants' honest services. This instruction did not require the jury to find that the defendants had taken any money or property from Hollinger; all it had to find was that in failing to disclose the recharacterization of the management fees to the audit committee and the board, they had failed to render honest services to Hollinger and had done so in an effort to obtain a private gain. That was a good instruction before the Supreme Court ruled that honest-services fraud requires proof of a bribe or kickback, but no longer; and the question is therefore whether a reasonable jury might have convicted the defendants of depriving the company of their honest

services for private gain but not have convicted them of pecuniary fraud.

That is unlikely, but no stronger assertion is possible. Although the defendants did not deny having *sought* a private gain, they contended that it was intended to be a gain purely at the expense of the Canadian government, not at the expense of Hollinger because (they contend) Hollinger owed them the money; and they were not accused of defrauding the Canadian government, only of defrauding Hollinger. There was plenty of evidence that Hollinger did not owe them $5.5 million in management fees, but the evidence was not conclusive, while all that the jury had to find in order to convict them of honest-services fraud was their failure to level with the board and the audit committee, which was irrefutable.

Had they disclosed that the recharacterization of management fees would net them a higher after-tax income, the board might have decided that the addition to their income warranted a reduction in the size of the fees. "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.); see also *Ranke v. United States*, 873 F.2d 1033, 1039-40 (7th Cir. 1989). The defendants had a duty of candor to the board in the conflict-of-interest situation in which they found themselves, and by violating that duty they caused Hollinger to make false filings with the SEC, and they did so for their private gain. That

was a solid honest-services case before the Supreme Court weighed in, but not a solid pecuniary-fraud case. The government did not argue, as it might have done, by analogy to cases such as *United States v. Richman*, 944 F.2d 323, 330 (7th Cir. 1991), and *United States v. Gole*, 158 F.3d 166, 168 (2d Cir. 1998), that even if the defendants were owed the fees, they had obtained them fraudulently, as when an employee who is owed $100 by his employer forges a check to himself for the amount and thus fraudulently appropriates money owed him. Cf. *Edwards v. State*, 181 N.W.2d 383, 387-88 (Wis. 1970); *State v. Self*, 713 P.2d 142, 144 (Wash. App. 1986).

What we're calling the second fraud count involves payments to the defendants (via Hollinger) of $600,000 in connection with Hollinger's sale to two companies, Forum and Paxton, which to simplify we'll treat as one, of community newspapers; the $600,000 was allegedly compensation for the defendants' promising not to compete with these newspapers after the sale. The defendants don't contend that the money represented management fees owed by Hollinger. The contention rather is that the money was compensation for bona fide covenants not to compete. The contention is implausible because these are small newspapers and the defendants could have no interest in going into competition with them as individuals—for the covenants bind them, not Hollinger or any other company that might want to enter the community-newspaper business. The owners of Forum-Paxton testified that they didn't request such a covenant. Their testimony was not only disinterested but was supported by the clowning note that David Radler, an executive of Hollinger, wrote to the defendants, in which he said that Forum-Paxton had "asked for a 5-year non-compete from

Conrad [Black] and me covering not only the states wherein they purchased assets but those states that border the said states. This would leave us only Alaska, Wyoming and Louisiana for us to continue our activities . . . . I have been assured there is [*sic*] suitable accommodations four [*sic*] our new headquarters in Casper, Wyoming."

What makes the contention that the $600,000 was compensation for covenants not to compete additionally and decisively unbelievable is that there are no covenants. The defendants concede that none was prepared, but attribute the omission to innocent mistake. The concession fatally undermines their challenge to the convictions on this count. Either the failure to prepare covenants was an innocent mistake—in which event the defendants could no more be convicted by a reasonable jury of honest-services fraud than of pecuniary fraud, because a merely careless withholding of services owed a principal by an agent was never criminal fraud under the honest-services provision (or any other provision) of the mail and wire fraud statutes, *United States v. Cochran*, 109 F.3d 660, 667-68 (10th Cir. 1997); see also *United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008); *United States v. Bloom*, 149 F.3d 649, 654-55 (7th Cir. 1998)—or no covenants were intended, and the fees were part of the purchase price of the newspapers, owed to Hollinger and stolen by the defendants. No reasonable jury could have acquitted the defendants of pecuniary fraud on this count but convicted them of honest-services fraud.

The defendants argue that maybe the jury believed that the absence of the covenants was an innocent mistake but convicted them because they failed to disclose the payments to the board. The failure to

disclose is mentioned in passing in the information, but the evidence at trial, and the closing arguments, focused on whether the absence of a written covenant was merely an oversight or instead proof of pecuniary fraud.

The jury acquitted the defendants on two other counts related to covenants not to compete with Forum-Paxton. But in those instances the fees went to Hollinger, and it is Hollinger that issued covenants not to compete, not the defendants, and Hollinger was a far more plausible entrant into Forum-Paxton's markets than the defendants, as individuals, were. The only rational explanation for the split verdict is that the jury believed that the $600,000 that the defendants received from Forum-Paxton without covenants not to compete, unlike the other transactions with that company, was proceeds of a plain-vanilla pecuniary fraud—and only a pecuniary fraud. For had the jury believed that a failure to disclose the fees for promising not to compete with the little newspapers was honest-services fraud, it would have convicted the defendants on all the fraud counts, because the defendants disclosed those fees neither to the board nor to the shareholders; and the jury didn't do that.

When to this logical point are added the absence of a written record of a $600,000 transaction, the disinterested testimony by the newspapers' buyers that they did not request covenants not to compete, Radler's implicit boast that the covenants were fabrications, and the absence of an economic reason for them (because the defendants had no conceivable interest in becoming individual publishers of small community newspapers), the evidence of pecuniary

fraud is so compelling that no reasonable jury could have refused to convict the defendants of it.

To sum up, the convictions on the APC count are reversed, and the convictions on the Forum-Paxton count and the obstruction of justice count are affirmed. The sentences are vacated and the case remanded for resentencing, as well as for trial, limited however to the APC count.

But although the defendants are entitled to a new trial on that count, the entitlement is moot unless the government decides to retry them. The government may wish instead, in order to conserve its resources and wind up this protracted litigation, to dismiss the APC count and proceed directly to resentencing. The judge could consider at the resentencing hearing the evidence that had been presented at the original trial concerning APC in determining what sentences to impose on the two counts (the $600,000 fraud involving Forum-Paxton and, with respect to Black, obstruction of justice as well) of which the defendants were properly convicted. 18 U.S.C. § 3661. "A jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam); see also *United States v. Quintero*, 618 F.3d 746, 755 (7th Cir. 2010); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005). (And there was no acquittal on the APC count, just an error warranting—barely—a retrial.) But of course it is for the government to determine, not us, how to proceed on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 17, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

Nos. 07-4080, 08-1030, 08-1072

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CONRAD M. BLACK, PETER Y. ATKINSON, and JOHN A. BOULTREE,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 08 CR 727

Amy J. St. Eve, *Judge*.

ORDER

On November 12, 2010, defendant-appellant Conrad M. Black, and defendants-appellants Peter Y. Atkinson and John A. Boultree, filed two separate

petitions for rehearing with suggestion for rehearing *en banc*, and on December 3, 2010, plaintiff-appellee filed an answer to the petitions. All the judges on the original panel have voted to deny the petitions, and none of the judges in regular active service has requested a vote on the petitions for rehearing *en banc*.* The petitions are therefore **DENIED**.

* Circuit Judges Joel M. Flaum and Illana Diamond Rovner did not participate in the consideration of these petitions for rehearing.

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-4080, 08-1030, 08-1072, 08-1106

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 05 CR 727—**Amy J. St. Eve**, *Judge*.

ARGUED JUNE 5, 2008—DECIDED JUNE 25, 2008

Before POSNER, KANNE, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. At the end of a four-month trial, the jury convicted the defendants of mail and wire fraud in violation of 18 U.S.C. § 1341

and Black in addition of obstruction of justice in violation of 18 U.S.C. § 1512(c). The judge sentenced him to 78 months in prison, Atkinson and Boultbee to 24 and 27 months, and Kipnis to probation with six months of home detention.

The defendants were senior executives (Black was the CEO) of an American company called Hollinger International, which through subsidiaries owns a number of newspapers here and abroad. It was controlled by a Canadian company, since defunct, called Ravelston, which in turn was controlled by Black, who owned 65 percent of its shares. (In between Hollinger and Ravelston was a holding company that we can ignore.) Black effectively controlled Hollinger through his majority stake in Ravelston. He owned some stock in Hollinger, but a much higher percentage of the stock of Ravelston, in which Atkinson and Boultbee also owned stock. So it was in his and their financial interest to funnel income received by Hollinger to Ravelston. This was done by Hollinger's paying large management fees to Ravelston.

Hollinger had a subsidiary called APC, which owned a number of newspapers that it was in the process of selling. When it had only one left—a weekly community newspaper in Mammoth Lake, California (population 7,093 in 2000, the year before the fraud)—defendant Kipnis, Hollinger's general counsel, prepared and signed on behalf of APC an agreement to pay the other defendants, plus David Radler, another Hollinger executive and a major shareholder in Ravelston, a total of $5.5 million in exchange for their promising not to compete with APC for three years after they stopped working for Hollinger. The money was paid. Neither Hollinger's

audit committee, which was required to approve transactions between Hollinger's executives and the company or its subsidiaries because of conflict-of-interest concerns, nor Hollinger's board of directors, was informed of this transaction. Or so the jury was entitled to find; the evidence was conflicting.

That Black and the others would start a newspaper in Mammoth Lake to compete with APC's tiny newspaper there was ridiculous. But the defendants argue that really the $5.5 million represented management fees owed Ravelston and that they had characterized the fees as compensation for granting covenants not to compete in the hope that Canada might not treat the fees as taxable income. Although Hollinger is a large, sophisticated, public corporation, no document was found to indicate that the $5.5 million in payments was ever approved by the corporation or credited to the management-fees account on its books. The checks were drawn on APC, though the evidence was that the defendants had no right to management fees from that entity, and were backdated to the year in which APC had sold most of its newspapers. The purpose of the backdating was—or so the jury could find—to make the compensation for the covenants not to compete seem less preposterous. And while management fees were supposed to be paid to *Ravelston* as well as from a management-fee account, the payments were made to the defendants personally and came from the proceeds of a newspaper sale, facts that increase the implausibility of supposing that these direct payments to the defendants were a means of discharging a debt owed them by Hollinger. It is true that Radler, who pleaded guilty and testified for the government, said that he thought the audit committee had approved the so-called management fees. But the members of the

committee testified otherwise and the jury was entitled to believe them.

There is more. The defendants failed to disclose the $5.5 million in payments in the 10-K reports that they were required to file annually with the Securities and Exchange Commission. And they caused Hollinger to represent to its shareholders falsely that the payments had been made "to satisfy a closing condition."

There was still more evidence of the fraud, but there is no need to go into it. The jury convicted the defendants of a second, similar fraud, on equally compelling evidence; there is no need to extend the opinion with a discussion of that either.

The evidence established a conventional fraud, that is, a theft of money or other property from Hollinger by misrepresentations and misleading omissions amounting to fraud, in violation of 18 U.S.C. § 1341. *United States v. Orsburn*, 525 F.3d 543, 545-46 (7th Cir. 2008). But the jury was also instructed that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders "of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger," provided the objective of the scheme was "private gain." That instruction is the focus of the appeals.

Section 1346 of the federal criminal code, added in 1988 in order to overrule *McNally v. United States*, 483 U.S. 350 (1987), defines "scheme or artifice to defraud" in section 1341 to include a scheme or artifice to "deprive another of the intangible right of honest services." The defendants do not deny that Hollinger was entitled to their honest services. They were senior executives of Hollinger and owed the

corporation fiduciary obligations, implying duties of loyalty and candor. It is not as if Black had merely been using his power as controlling shareholder to elect a rubber-stamp board of directors or to approve a merger favorable to him at the expense of the minority shareholders. He was acting in his capacity as the CEO of Hollinger when he ordered Kipnis to draft the covenants not to compete and when he duped the audit committee and submitted a false 10-K. On his own theory, the fees that he collected, which the jury was entitled to find were never owed to him, were management fees rather than dividends. The defendants' unauthorized appropriation of $5.5 million belonging to a subsidiary of Hollinger was a misuse of their positions in Hollinger for private gain, which is just the kind of conduct that we said in *United States v. Bloom*, 149 F.3d 649, 655-57 (7th Cir. 1998), was the essence of honest services fraud. See also *United States v. Hausmann*, 345 F.3d 952, 955-57 (7th Cir. 2003); *United States v. Rybicki*, 354 F.3d 124, 141-42 (2d Cir. 2003) (en banc).

So if the jury found such a misappropriation, this would mean that the defendants, having both deprived their employer of its right to their honest services and obtained money from it as a result, were guilty of both types of fraud. *United States v. Turner*, 465 F.3d 667, 678-79 (6th Cir. 2006); *United States v. Caldwell*, 302 F.3d 399, 408 (5th Cir. 2002). Nothing is more common than for the same conduct to violate more than one criminal statute. But the section 1346 instruction, which we quoted, did not require that the jury find that the defendants had taken any money or property from Hollinger; all it had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done

so to obtain a private gain. The defendants do not deny that they sought a private gain. But they presented evidence that it was intended to be a gain purely at the expense of the Canadian government. They argue that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services—a group not argued to include the Canadian government.

They are making a no harm-no foul argument, and such arguments usually fare badly in criminal cases. Suppose your employer owes you $100 but balks at paying, so you help yourself to the money from the cash register. That is theft, e.g., *State v. Winston*, 295 S.E.2d 46, 51 (W. Va. 1982); *Edwards v. State*, 181 N.W.2d 383, 387-88 (Wis. 1970); *State v. Self*, 713 P.2d 142, 144 (Wash. App. 1986), even though if the employer really owes you the money you have not harmed him. You are punishable because you are not entitled to take the law into your own hands. Harmlessness is rarely a defense to a criminal charge; if you embezzle money from your employer and replace it (with interest!) before the embezzlement is detected, you still are guilty of embezzlement.

The application of this principle to honest services mail and wire fraud is straightforward. As explained in *United States v. Orsburn*, *supra*, 525 F.3d at 546, section 1346 was added "to deal with people who took cash from third parties (via bribes or kickbacks). *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), supplies a good example. Judge Holzer accepted bribes from litigants. What he took from his employer, the state's judicial system, was the honest adjudication service that the public thought it

was purchasing in exchange for his salary." See also *United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008); *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007); *Man-Seok Choe v. Torres*, 525 F.3d 733, 737 (9th Cir. 2008); *United States v. Kemp*, 500 F.3d 257, 279-80 (3d Cir. 2007); *United States v. Rybicki*, *supra*, 354 F.3d at 139-42. Similarly, if the defendants in this case deprived their employer, Hollinger, of the honest services they owed it, the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit) is no defense.

This case is different from those we have cited because Canada was not bribing the defendants with the offer of a tax benefit. But the distinction is unrelated to anything in the text or purpose of section 1346. The grant of a tax benefit is a purposive act, which confers a benefit on the grantor just as a voluntary transfer of money or property to him does; in fact it *is* a voluntary transfer of money. The defendants do not argue that they were trying to defraud Canada; they argue that their recharacterization of management fees as compensation for granting covenants not to compete was proper under Canadian tax law, even if the receipt of the payments violated American law. Canada, they contend in effect, was willing to "pay" the defendants in the form of a tax benefit in order to advance Canadian policy.

And if the defendants were trying to defraud Canada, that augmentation of their wrongdoing would not help their case. Suppose a third party gives a bribe to a buyer for a department store, and the buyer pockets the bribe but does not carry out his side of the bargain, which was that he would purchase supplies from the principal of the person who

bribed him. The buyer has deprived his employer (the department store) of his honest services, and has done so for private gain, but he has conferred no benefit on a third party. Judges who accept bribes invariably argue that they didn't allow the bribes to influence their decisions. But a judge who accepts bribes deprives the judiciary of his honest services even if, as contended by Francis Bacon, the most famous of corrupt judges, he does nothing for the person who bribed him. Such a case does not differ materially from that of the "honest" recipient of a bribe—the recipient who, committed to honor among thieves, performs his side of the illegal bargain.

Notice, too, how honest services fraud bleeds into money or property fraud. In the procurement case, the eagerness of the seller's agent to make a sale might enable the purchasing agent to negotiate a better price, to the financial benefit of his employer; instead he takes the "better price" in the form of a bribe. In this case, had the defendants disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net the defendants a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees. If $10 in tax-free income is worth $15 to the recipient in taxed income, the employer who learns about the tax break may require the employee to accept in tax-free income less than $15 in taxed income.

This is not to say that every corporate employee must advise his employer of his tax status. But the defendants had a duty of candor in the conflict-of-interest situation in which they found themselves. Instead of coming clean they caused their corpora-

tion to make false filings with the SEC, and they did so for their private gain. Such conduct is bound to get a corporation into trouble with the third party and the SEC.

Even if our analysis of honest services fraud is wrong, the defendants cannot prevail. There is no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services; whether they also got (or hoped to get) a tax break from the Canadian government was not an issue at trial, as the defendants acknowledged, albeit backhandedly, when they said in their reply brief in this court that the theory "that defendants 'misused' their positions at [Hollinger] for personal gain in the form of Canadian tax benefits" was "the very theory the government propounded *up to the eve of trial*" (emphasis added). It was not the government's theory at trial.

The defendants point out that *Yates v. United States*, 354 U.S. 298 (1957), held that if the instructions permit the jury to convict of a nonexistent crime, the fact that they also permit it to convict of a genuine crime will not save a conviction declared in a general verdict. *United States v. Sorich*, *supra*, 523 F.3d at 706. That is different from a case in which two correct theories of illegality are presented in the instructions and there is sufficient evidence to convict only on one; the jury is assumed to have followed the instruction on the government's burden of proof and therefore to have rejected the insufficiently supported theory. *Griffin v. United States*, 502 U.S. 46, 59-60 (1991); *Tenner v. Gilmore*, 184 F.3d 608, 611 (7th Cir. 1999). But a jury that is given an illegal instruction cannot be assumed not to have followed

it, since juries are neither authorized nor competent to make judgments of law.

An error in jury instructions is subject to the harmless-error doctrine. E.g., *Pope v. Illinois*, 481 U.S. 497, 502-03 (1987); *United States v. Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005). Submitting an illegal theory to the jury may or may not be subject to it; it is an issue on which the courts of appeals are divided. Compare *United States v. Cappas*, 29 F.3d 1187, 1192-93 (7th Cir. 1994), and *United States v. Holly*, 488 F.3d 1298, 1305-06 n. 3 (10th Cir. 2007), with *Lara v. Ryan*, 455 F.3d 1080, 1085 (9th Cir. 2006), and *United States v. Edwards*, 303 F.3d 606, 641-42 (5th Cir. 2002). But giving an instruction that omits a qualification required to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability. The prosecution did not ask the jury to convict the defendants because their private gain was at Canada's expense. The government's honest services theory was straightforward. It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete. Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them.

If the jury had been given a special verdict that separated the two types of fraud, and had indicated on the verdict that the defendants were not guilty of an honest services fraud, the challenge to the instruction would be moot. The defendants were not required to request a special verdict. But there is a wrinkle in this case that shows they forfeited their

objection to the instruction: the *government* requested a verdict that would require the jury to make separate findings on money or property fraud and on honest services fraud. The defendants objected—they wanted a general verdict. In effect, they wanted to reserve the right to make the kind of challenge they are mounting in this court.

They are reduced to arguing that the judge *after* receiving the verdict should have told the jury to determine whether it had found both a money or property fraud and an honest services fraud. That procedure was tentatively approved by the Third Circuit in *United States v. Riccobene*, 709 F.2d 214, 228 n. 19 (3d Cir. 1983), although that court has since made clear that it is better to give the jurors the interrogatories on the same form as the verdict. *United States v. Hedgepeth*, 434 F.3d 609, 613-14 (3d Cir. 2006). Questioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that a district judge is *required* to employ; nor has the Third Circuit so suggested. The defendants' proposal could if adopted create a nightmare in which the jury renders a general verdict; the jurors are polled and think they're about to be released from their term of indentured servitude—here four months—and be free to get on with their lives; and then they are told they must take an exam so that the judges and lawyers can know exactly how they evaluated the various theories presented to them in the instructions. Must they resume deliberations? And if they disagree, what then—an *Allen* charge?

We turn to the obstruction of justice charge against Black. The charge is that he concealed or attempted to conceal documents "with the intent to impair the [documents'] integrity or availability for

use in an official proceeding." 18 U.S.C. § 1512(c)(1). There was evidence that Black knew that the alleged frauds were being investigated by a grand jury and by the SEC. In the midst of these proceedings Black with the help of his secretary and his chauffeur removed 13 boxes of documents from his office, put them in his car, was driven home, and helped carry them from the car into his house. He later returned them, but no one knows whether the boxes he returned contained all the documents that had been in them when he removed them from his office. It is true that copies were available to the government before the boxes were removed, but it was material to the investigation whether Black had had copies in his office. For that would mean that he had received them, in which event his denials of knowledge of their contents would be undermined.

Anyway, the statute does not require proof of materiality, *United States v. Ortiz*, 367 F. Supp. 2d 536, 542-44 (S.D.N.Y. 2005), affirmed without opinion, 220 Fed. App'x 13 (2d Cir. 2007), for the excellent reason that being able to deny the materiality of a document is the usual reason for concealing the document. All that need be proved is that the document was concealed in order to make it unavailable in an official proceeding. See, e.g., *United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002); *United States v. Lessner*, 498 F.3d 185, 197-98 (3d Cir. 2007); *United States v. Tampas*, 493 F.3d 1291, 1300-01 (11th Cir. 2007). The evidence of that was ample. Black's secretary testified that Black intended to remove the documents to a temporary office that she would set up for him in her home because he had to vacate his office at Hollinger within 10 days. But this testimony was inconsistent with his having put the boxes in his car (not hers, which was at the

scene) and taken them home. There was also evidence that in removing the boxes he tried to avoid the surveillance cameras in the building—unsuccessfully.

Three more issues need to be discussed. The first is whether an "ostrich" instruction should have been given. The reference of course is to the legend that ostriches when frightened bury their head in the sand. It is pure legend and a canard on a very distinguished bird. Zoological Society of San Diego, *Birds*: *Ostrich*, www.sandiegozoo.org/animalbytes/t-ostrich.html (visited June 12, 2008) ("When an ostrich senses danger and cannot run away, it flops to the ground and remains still, with its head and neck flat on the ground in front of it. Because the head and neck are lightly colored, they blend in with the color of the soil. From a distance, it just looks like the ostrich has buried its head in the sand, because only the body is visible"). It is too late, however, to correct this injustice.

An ostrich instruction tells the jury that to suspect that you are committing a crime and then take steps to avoid confirming the suspicion is the equivalent of intending to commit the crime. E.g., *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). Suppose you *think* you've rented your house to a drug gang, but to avoid confirming your supposition you make sure not to drive near the house, where you might observe signs of drug activity. That would be the equivalent of knowledge that you had rented the house to the gang. It would be a case of *physical* avoidance of confirmation of one's suspicions but there is also *psychological* avoidance, which is the type alleged here and which requires the jury's "distinguishing between a defendant's mental effort

of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). It is the distinction between willful ignorance and ordinary ignorance.

The defendants argue that either they knew they were taking money that they were not entitled to, or they were entitled to it; there is no middle ground. But there is. Remember that the defendants received the payments in question not from Hollinger but from APC, which the evidence showed did not owe them any management fees. If you receive a check in the mail for $1 million that you have no reason to think you're entitled to, you cannot just deposit it and when prosecuted for theft say you didn't know you weren't entitled to the money—that it might have been a random gift from an eccentric billionaire. You would have strongly suspected that you weren't entitled to the money and you would therefore have a duty to investigate. By shutting your eyes you tacitly confessed your all-but-certain knowledge that you were stealing the money. *United States v. Orsburn*, *supra*, 525 F.3d at 545 ("The embezzled funds were roughly twice the couple's legitimate income, and they spent it all. Michael could hardly avoid noticing this sudden improvement in the couple's fortunes even if he never looked at bank statements"); *United States v. Rogers*, 289 F.2d 433, 438 (4th Cir. 1961); 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.2(g), pp. 71-72 (2d ed. 2003).

The defendants argue that the judge gave an inadequate limiting instruction with respect to the jury's use of the false filings with the SEC. The in-

struction, although correct, was abrupt: "You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud." It was important for the jury to understand that it could use the false filings to infer that the defendants had been trying to conceal their receipt of the payments but that the filings themselves were not charged as crimes.

The defendants proposed a misleading instruction as an alternative. It substituted for the second sentence ("The defendants in this case are not charged with securities fraud") the following: "The defendants are not charged with making false or misleading statements in these filings, and you may not conclude that a defendant is guilty of mail or wire fraud based on any alleged false statements or omissions in any of these filings." The defendants *were* "charged," in the sense of accused, of making false statements in these filings. And the jury *was* entitled to base a judgment of guilt "on any alleged false statements or omissions in any of these filings," provided that the false statement or omission was material to the alleged mail or wire fraud. At argument, the lawyer who had proposed the instruction told us at first that he had made other, oral submissions as well. But when reminded that he had said in his brief that he had "proposed a series of limiting instructions, culminating with this request for the final charge"—the proposed instruction that we quoted—he backed off.

If one party submits an instruction that is accurate but could be made clearer, and the other party

submits a misleading instruction, the judge can go with the first instruction. Not that the cases require "that a submitted charge be technically perfect to alert the court to the need for a particular charge." *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983); see also *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 9-10 (1st Cir. 1998). But given the number and skill of the defendants' lawyers, the misleading character of their proposed instruction cannot be regarded as a merely "technical" failing, as opposed to an effort to mislead. Nor was the judge's instruction erroneous; it was merely terse.

Defendant Kipnis, the least culpable of the defendants, as indicated by the light sentence he received (though any felony conviction is likely to be devastating for a lawyer), complains that he should have been acquitted because he knew nothing about the management fees and had nothing to gain from the fraud. The last point has no merit, since Black controlled Hollinger and therefore held Kipnis's fate in his hands. The first two points are really just one point, with respect to which the ostrich instruction was decisive. It was he who prepared the agreement that purported to grant covenants not to compete in exchange for $5.5 million. He knew that the covenants made no sense, since APC was on its way out of the newspaper business and the other grantors of the covenants not to compete were not about to leave Hollinger to start a newspaper in Mammoth Lake. The jury was entitled to infer that Kipnis suspected a fraud, which he facilitated by his preparation of the agreement, but asked no questions lest his suspicion rise to a certainty. He buried his head in the sand.

The defendants raise some other points in their 161 pages of briefs, but none that has sufficient merit to require discussion. The judgments are

AFFIRMED.

APPENDIX D

28 U.S.C. § 2106 provides:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2111 provides:

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 52 provides:

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 05 CR 727
	)	
	)	Violations: Title 18,
v.	)	United States Code,
	)	Sections 1341, 1343,
CONRAD M. BLACK,	)	1346, 1512, 1957,
JOHN A. BOULTBEE,	)	1962 and 2; Title 26,
PETER Y. ATKINSON	)	United States Code,
and MARK S. KIPNIS	)	Section 7206(2)
	)	
	)	Hon. Amy J. St. Eve
	)	
	)	**SUPERSEDING**
	)	**INFORMATION**

COUNT ONE

The UNITED STATES ATTORNEY charges:

1. At times material herein:

The Entities and Individuals

a. Hollinger International, Inc. ("International") was a Delaware corporation with an office located in Chicago, Illinois. International was a holding company that was publicly traded on the New York Stock Exchange. Through its operating subsidiaries, International owned and published

newspapers around the world, including the *Chicago Sun-Times*, *The Daily Telegraph* in the United Kingdom, the *National Post* in Toronto, the *Jerusalem Post* in Israel, and numerous community newspapers in the United States and Canada. International had a Board of Directors and an Audit Committee that met regularly to conduct business. The Audit Committee, which consisted of three independent directors, functioned as International's independent director committee for purposes of reviewing and approving the fairness of transactions between International and its controlling shareholders, officers and/or directors – commonly referred to as "related party transactions."

b. Delaware corporate law imposes a fiduciary duty of loyalty on controlling shareholders, officers and directors of Delaware corporations such as International that forbids them from using their position of trust and confidence to further their private interests. Furthermore, this fiduciary duty forbids controlling shareholders, officers and directors from usurping corporate opportunities for their own personal benefit, or misleading or deceiving the corporation's board of directors. Controlling shareholders, officers and directors seeking to engage in related party transactions with a company under their control must disclose all material facts to the independent directors of the company and abide by the determination of those directors as to the fairness of the transaction. Such fiduciaries must ensure that all such related party transactions are "entirely fair," meaning that the transaction was both procedurally and substantively fair to the company.

c. Hollinger Inc. ("Inc.") was a Canadian corporation with its principal office located in To-

ronto, Canada. Inc. was a holding company that was publicly traded on the Toronto Stock Exchange. Inc.'s primary asset was its interest in International, which it held directly and through various subsidiaries. Throughout the relevant time period, Inc. held approximately 30% of International's equity, but still controlled a majority of International's stock voting power. This disproportionate voting power existed because most of Inc.'s shares in International were in the form of Class B common stock that had a 10-1 voting preference over the Class A common shares held by International's public shareholders. Thus, Inc. was the controlling shareholder of International even though it owned a minority of the equity interest. As a controlling shareholder, Inc. had a fiduciary duty of undivided loyalty to International, which among other things, required Inc. to refrain from acting to benefit itself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and Inc.

d. The Ravelston Corporation Limited ("Ravelston") was an Ontario corporation with its principal office located in Toronto, Canada. Ravelston was a privately held corporation, with 98.5% of its equity owned by officers and directors of International and Inc., and 1.5% owned by the estate of a former Inc. director. Ravelston's principal asset was its controlling interest in Inc., which it held directly and through various subsidiaries, and which was approximately 78% of Inc.'s equity during the relevant time period. Thus, Ravelston was the controlling shareholder of International through its controlling interest in Inc. As the controlling shareholder, Ravelston had a fiduciary duty of undivided loyalty to International, which among other things, required

Ravelston to refrain from acting to benefit itself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and Ravelston.

e. Defendant CONRAD M. BLACK, who was trained as an attorney, was a Canadian citizen until 1999, when he became a dual citizen of Canada and the United Kingdom. In 2000, BLACK became a member of the House of Lords in the United Kingdom. Black resided in Toronto, London and Palm Beach, Florida. In addition, during the relevant time period, he often stayed at an apartment in New York City. The apartment was owned by International until December 2000, at which time BLACK purchased the apartment from International. BLACK, through Conrad Black Capital Corporation, owned approximately 65.1% of Ravelston. BLACK was Chief Executive Officer and Chairman of the Board of Directors of Ravelston, Inc. and International. At International, BLACK's duties were to oversee International's operations, finances and corporate strategy, including all significant acquisitions and sales of assets. As a controlling shareholder, officer and director of International, BLACK had a fiduciary duty of undivided loyalty to International, which among other things, required BLACK to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

f. Defendant JOHN A. "Jack" BOULTBEE, who was a Chartered Accountant in

Canada, was a Canadian citizen who resided in the Toronto area. BOULTBEE, through Mowitza Holdings, Inc., owned approximately .98% of Ravelston. BOULTBEE was: (1) Chief Financial Officer of Ravelston; (2) Chief Financial Officer, Executive Vice President and a director of Inc.; and (3) Executive Vice President and, for a period of time, Chief Financial Officer, of International. At International, BOULTBEE's principal duties were to oversee finances, including matters relating to taxes. As an officer of International, BOULTBEE had a fiduciary duty of undivided loyalty to International, which among other things, required BOULTBEE to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

g. Defendant PETER Y. ATKINSON, who was a licensed attorney in Canada, was a Canadian citizen who resided in the Toronto area. ATKINSON owned .98% of Ravelston. ATKINSON was Vice President and General Counsel of Inc., and Executive Vice President of International. ATKINSON's principal duties at International were to oversee legal affairs. As an officer of International, ATKINSON had a fiduciary duty of undivided loyalty to International, which among other things, required ATKINSON to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

h. Defendant MARK S. KIPNIS was a United States citizen and an experienced attorney licensed in Illinois to practice law. KIPNIS has a B.S. degree in accounting and has been an attorney specializing in transactional law since 1974. KIPNIS was Vice President, Corporate Counsel and Secretary of International, and worked at International's office in Chicago. In this position, KIPNIS's duties included: (1) documenting and closing the purchases and sales of newspapers by International and its subsidiaries; (2) preparing International's annual proxy statement, which was distributed to International's shareholders in advance of International's annual shareholder meeting and which was filed with the United States Securities and Exchange Commission ("SEC"); (3) acting as secretary at meetings of International's Board of Directors and Audit Committee, and as keeper of the official corporate minute books; (4) preparing the agenda and collecting materials for the directors in connection with the meetings of International's Board of Directors and Audit Committee, and distributing the agenda and materials to the directors in advance of the meetings; and (5) presenting all related party transactions to International's Audit Committee, which functioned as International's independent director committee, for its review and approval. As International's in-house attorney, KIPNIS had a fiduciary duty of undivided loyalty to International, which among other things, required KIPNIS to disclose all material facts regarding all related party transactions to International's Audit Committee, and to refrain from assisting others in any breach of fiduciary duty against International.

i. F. David Radler was a Canadian citizen who resided in Vancouver, Canada. During the rele-

vant time period, he often stayed at an apartment in Chicago that was owned by International, and often worked at International's office in Chicago. Radler, through FDR Ltd., owned approximately 14.2% of Ravelston, of which he was President. Radler was the Deputy Chairman of the Board of Directors, the President and the Chief Operating Officer of both International and Inc. At International, Radler's principal duties were to manage the newspaper operations of the company in the United States and parts of Canada. On those occasions when International or its subsidiaries bought or sold newspapers, Radler often was involved in negotiating the business terms of those transactions. As an officer and director of International, Radler had a fiduciary duty of undivided loyalty to International, which among other things, required Radler to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

Ravelston's Management of International

j. BLACK, Radler, BOULTBEE and ATKINSON were not employees of International, but rather of Ravelston. The services of these executives, along with certain accounting, financial reporting and other administrative functions, were provided by Ravelston to International pursuant to a management services agreement between the two companies. The management services agreement, which was signed by KIPNIS on behalf of International and was dated as of January 1, 1998, provided that International and Ravelston would meet at least annu-

ally to determine whether Ravelston would continue to provide these services to International and at what fee. The fee was to be determined through negotiations between Ravelston and a committee of International's independent directors. In the agreement Ravelston represented and promised that it would discharge its duties thereunder honestly, in good faith, and in the best interest of International. The agreement further stated that Ravelston would provide the details of any conflict of interest involving Ravelston's performance of its management services to the Secretary of International, namely KIPNIS, whose job and fiduciary duty it was to present all material facts concerning all related party transactions to International's Audit Committee for its review and approval. Unless specifically authorized by International's Audit Committee, BLACK, Radler, BOULTBEE and ATKINSON received all of their compensation for their work at International, including all bonuses, from Ravelston.

k. Through his controlling interest in Ravelston, BLACK had an indirect ownership interest in Inc. of approximately 51%. Additionally, through his ownership interest in Inc., BLACK had an indirect ownership interest in International of approximately 15%. Despite having only a minority ownership in International, BLACK was able to maintain voting control over International though Inc.'s ownership of International's "super-voting" Class B Common Stock. The result of International's ownership structure was that every $100 transferred out of International and into Inc. would effectively "cost" (BLACK) $15 but give him $51 as Inc.'s controlling shareholder, thereby tripling his funds at the direct expense of International's non-controlling shareholders. Similarly, every $100 that was transferred out

of International and into Ravelston again would cost BLACK $15, but give him $65. As for funds transferred out of International directly to BLACK, he would receive the full amount of the funds, forgoing his 15% equity stake in International. Thus, BLACK was in a position to exert both his management position and voting control at International to transfer money to himself, and away from International's non-controlling and public shareholders, at a very low cost given his minority equity stake in International.

U.S. Community Asset Sales and Non-Competition Agreements

1. Starting in May of 1998, and continuing through 2001, International embarked on a business plan to sell off nearly all of its United States community newspaper assets. In May 1998, an International subsidiary sold a publication called *American Trucker* and several other smaller publications to Intertec Publishing Company for a total amount of approximately $75 million ("the *American Trucker* transaction"). In addition, from early 1999 through late 2000, International and its subsidiaries sold virtually all of International's United States community newspapers (except for those in the Chicago metropolitan area), in a series of sales to a variety of purchasers. These transactions were as follows:

Purchaser	Total Amount (approx.)	Closing Date	Referred To Herein As
Community Newspaper Holdings Inc.	$472 million	2/1/99	"CNHI I"
Horizon Publications Inc.	$43.7 million	3/31/99	"Horizon"

Forum Communications Inc.	$14 million	9/30/00	"Forum"
PMG Acquisition Corp.	$59 million	10/2/00	"Paxton"
Newspaper Holdings Inc.	$90 million	11/1/00	"CNHI II"

Newspaper Holdings Inc. was a subsidiary of Community Newspaper Holdings Inc. Horizon Publications Inc. was owned by Radler, KIPNIS and other International executives. None of the other purchasers had any ownership relationship to or with International.

m. Radler supervised the negotiations of the business terms of each of the transactions set forth in subparagraph k. KIPNIS participated in the documentation and closing of each transaction.

n. The closing documents for each of the transactions set forth in subparagraph k. included a non-competition agreement signed by International, whereby International promised not to acquire or establish a newspaper within a certain geographic distance from the newspapers it sold for a certain period of time after the sale. It was not unusual for transactions in the newspaper business to include a non-competition agreement signed by the seller. This was so because newspaper purchasers buy not just the trade name of the newspaper, but also its subscriber and advertiser bases. Purchasers often request the seller's agreement not to return to the same area in a short period of time and operate a rival newspaper. For commercial and tax purposes, it is not unusual for the buyer and seller to allocate a

portion of the sales proceeds towards the seller's non-competition agreement. The buyer, however, typically does not pay additional consideration for a separate agreement that prohibits the seller's affiliates and officers from personally competing with the buyer.

o. In connection with the non-competition agreements in the transactions set forth in subparagraph l, the fiduciary duty of loyalty owed by BLACK, BOULTBEE, ATKINSON, KIPNIS and Radler to International required each of them to use his skill and ability to maximize International's share of the proceeds allocated to the non-competition agreement and to refrain from acting to International's detriment. If one of International's controlling shareholders, officers or directors received a portion of the proceeds allocated to the non-competition agreement, all of the above-named defendants and Radler and Ravelston, as well as any other knowledgeable officer, director or controlling shareholder of International, had a fiduciary duty to disclose this fact to International's Audit Committee, so that the independent directors could review the transaction and ensure its fairness to International.

p. In 1996, a tax court in Canada held that, under the facts of that case, non-competition fees were not taxable under Canadian tax law. In December 1999, a Canadian federal court of appeal affirmed this decision. These court decisions created a potential tax benefit for Canadian taxpayers who legitimately received non-competition payments. BLACK, BOULTBEE, ATKINSON and Radler were Canadian taxpayers. BOULTBEE was extremely knowledgeable about tax law and was the architect

of much of the tax strategy employed by International, Inc. and the defendants.

SEC Disclosures

q. As a publicly traded company, International was obligated to make regular filings with the United States Securities and Exchange Commission ("SEC"), and was obligated in those filings to disclose all material facts about the company to investors. Among other things, International was required to fully and accurately disclose in its SEC filings related party transactions and compensation paid to its officers and directors.

General Scheme Allegations

2. Beginning no later than in or about January 1999 and continuing thereafter until at least in or about May 2001, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions, in connection with the U.S. Community Newspaper Asset Sales. This scheme is further described below.

3. It was part of the scheme that, in connection with the U.S. Community asset sales, Ravelston and its agents, including BLACK, BOULTBEE, ATKINSON and Radler, repeatedly abused their authority and fiduciary obligations as managers of International in order to fraudulently benefit themselves at the expense of International and its public shareholders. On multiple occasions, Ravelston's agents fraudulently inserted themselves and Inc. as recipients of non-competition fees that should have, and otherwise would have, been paid exclusively to International. Ravelston and its agents failed to disclose their self-dealing to International's Audit Committee, thereby enabling Ravelston and its agents to conceal the scheme, continue as International's managers, and quietly siphon away International assets. Ravelston's agents also abused their positions as International's managers by fraudulently causing International to mischaracterize bonus compensation payments to them as non-competition fees, in order to receive a tax benefit in Canada. KIPNIS aided and abetted this scheme by implementing the directives of Ravelston's agents and by failing to disclose this misconduct to International's Audit Committee. As a result of this scheme, defendants and their co-schemers fraudulently diverted over $32 million from International, and fraudulently deprived International of its right to receive their honest services.

American Trucker

4. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the *American Trucker* transaction. On or about May 11, 1998, International (through a subsidiary) sold

the *American Trucker* and *Mine and Quarry Trader* publications to Intertec Publishing Corporation ("Intertec") for approximately $75 million. The closing documents provided that $2 million of the sales proceeds was being paid to International as consideration for its assent to a non-competition agreement. Radler signed the asset purchase agreement and non-competition agreement on behalf of International. Intertec did not request or receive a non-competition agreement from Inc. as part of the transaction.

5. It was further part of the scheme that in or about January 1999, approximately eight months after the *American Trucker* transaction was concluded, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that they would divert the $2 million that International received for the *American Trucker* non-competition agreement to Inc. Consistent with this decision, Ravelston's agents caused the Executive Vice-President of International's Community Newspaper Division to send a memorandum, on January 27, 1999, to the Assistant Treasurer of International on which Radler was copied. The memorandum falsely stated that the $2 million from the *American Trucker* deal allocated to International's non-competition agreement "was actually for [Inc.] as compensation for the Non-Compete as specified in the *American Trucker* transaction."

6. It was further part of the scheme that on or about February 1, 1999, KIPNIS signed a $2 million check that International issued and sent to Inc. These funds purportedly represented the entire $2 million non-competition agreement allocation from the *American Trucker* transaction to Inc. as compensation for Inc.'s assent to a non-competition

agreement. Ravelston's agents and KIPNIS knew that Inc. had never signed or been asked to sign a non-competition agreement in the *American Trucker* transaction. Furthermore, Inc. did not present a competitive threat to any of the publications sold in the *American Trucker* transaction, and Inc. did not employ staff who could manage newspaper properties in the United States other than the staff already working for International, which was already subject to the non-competition agreement.

7. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose the $2 million payment from International to Inc. as a related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme. The $2 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the *American Trucker* transaction. The $2 million payment was a theft of International's corporate assets and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. Thus, by fraudulently moving the non-compete proceeds of the *American Trucker* transaction "up" from International to Inc., Ravelston and its controlling shareholders would effectively receive a larger portion of the non-compete proceeds than they would have otherwise received.

CNHI I

8. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the CNHI I transaction. On or about February 1, 1999, International sold certain of its newspaper assets to Community Newspaper Holdings, Inc. ("CNHI") for approximately $472 million. The deal letter for the CNHI I transaction, signed in December 1998, provided that International would sign a non-competition agreement and that $50 million of the transaction proceeds would be paid to International as consideration for its covenant not to compete.

9. It was further part of the scheme that in or about January 1999, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that Inc. would be inserted as a non-competition covenantor, and that Inc. would receive $12 million of the $50 million allocated to the non-competition agreement (approximately 25%). BLACK, BOULTBEE, Radler and KIPNIS were aware that CNHI had not requested that Inc. be added to the non-competition agreement.

10. It was further part of the scheme that in late-January 1999, only days before the February 1, 1999 closing, KIPNIS inserted Inc. into the closing documents as a non-compete covenantor. The final covenant not to compete falsely stated that CNHI "was not willing to enter into the Exchange Agreement and Lenders are not willing to provide financing to [CNHI] for the acquisition of the Newspapers unless Covenantors execute this Agreement." KIPNIS signed the asset purchase agreement and non-competition agreement on behalf of International,

and Radler signed the non-competition agreement on behalf of Inc. Both KIPNIS and Radler signed the non-competition agreements knowing full well that CNHI was willing to enter into the transaction without Inc.'s non-compete agreement.

11. It was further part of the scheme that at the closing of the CNHI I transaction on February 1, 1999, KIPNIS caused $12 million of the transaction proceeds to be wire transferred directly to Inc. instead of International. The $12 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $12 million payment was a theft of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. The $12 million payment to Inc. at International's expense was a related party transaction. Ravelston, its agents and KIPNIS others failed to disclose this related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

12. It was further part of the scheme that February 1999, Ravelston's agents caused Inc. to use the $14 million that it had fraudulently obtained in connection with the *American Trucker* ($2 million) and CNHI I ($12 million) transactions to pay down an overdue debt that Inc. owed to International. Thus, by "round-tripping" the funds that they had fraudulently obtained from International, Ravelston's agents had effectively caused International to repay

itself a significant portion of Inc.'s overdue debt. The $14 million in payments to Inc. at International's expense, and Inc.'s subsequent use of those funds to "repay" International were related party transactions. Ravelston and its agents failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

The Template

13. It was further part of the scheme that, in or about January 1999, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that, in connection with all future sales of International's U.S. community newspapers, Inc. would be inserted as a non-compete covenantor as a matter of course, and would receive 25% of the proceeds allocated to the non-competition agreement in each transaction. This decision, of which KIPNIS was aware and helped implement, was known as the "template." KIPNIS was present at the time the decision to implement the template was made, and characterized it as having been made by "Toronto" – a reference to Ravelston's agents based in Toronto, Canada. The decision to initiate the template in all future transactions would effectively siphon off 25% of any proceeds allocated to International's non-competition agreement regardless of whether the buyer requested or valued Inc.'s agreement not to compete. The implementation of the template was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from these transactions. The decision to create and implement the template, which would result in payments to Inc.

at International's expense, also was a plan to engage in a series of related party transactions. Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose the plan to implement the template to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

Horizon

14. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the Horizon transaction. Horizon was a privately-owned newspaper company in which BLACK and Radler owned substantial interests. In a transaction agreement dated March 31, 1999, International agreed to sell certain newspapers and specialty publications to Horizon for approximately $43.7 million. Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that the amount allocated to the non-competition agreement would be $5 million, and that, pursuant to the template, both International and Inc. would sign the non-competition agreement, with International receiving $3.8 million of the non-competition allocation and Inc. receiving $1.2 million of the non-competition allocation.

15. It was further part of the scheme that at the closing of the Horizon transaction, on June 30, 1999, KIPNIS helped implement the template by including Inc. in the transaction documents, and causing $1.2 million to be wire transferred to Inc. in August 1999 when Horizon received the funding necessary to close the transaction. KIPNIS signed the asset purchase agreement and non-competition agreement on behalf of International, and Radler signed the non-

competition agreement on behalf of Inc. Thus, in the Horizon transaction, Ravelston's agents, including BLACK, BOULTBEE and Radler, had in essence, negotiated an agreement with themselves (Inc.), not to compete against themselves (Horizon), resulting in them paying themselves (Inc.) approximately $1.2 million. The $1.2 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $1.2 million payment was a theft of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston again benefitted by this theft because it owned a greater percentage of Inc. than it did of International. The $1.2 million payment to Inc. at International's expense was a related party transaction. Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose this related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

Individual Non-Competition Payments

16. It was further part of the scheme that, in the summer of 2000, BLACK, BOULTBEE, ATKINSON and Radler decided that, with respect to anticipated transactions with Forum, Paxton and CNHI II, they would insert themselves as individual non-compete covenantors and would divert a portion of the proceeds of each of these transactions to themselves as bonus compensation. The decision to characterize these payments as "non-competition" payments, as opposed to bonus compensation, was motivated, at

least in part, by a desire to receive favorable tax treatment in Canada, where legitimate non-competition payments potentially received tax-advantaged treatment. These payments were to be above and beyond the funds allocated to the non-competition agreement in the transaction by the parties, which would continue to be divided between International and Inc. pursuant to the template. This decision, of which KIPNIS was aware and helped implement, was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from these transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose their plan to pay themselves bonus compensation and mischaracterized these payments as "non-competition fees" to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme at International's expense.

Forum and Paxton

17. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS defrauded International in connection with the Forum and Paxton transactions. On or about September 30, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Forum Communications Co. for $14 million, $400,000 of which was allocated to non-competition agreements. On or about October 2, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Paxton for approximately $59 million, $2 million of which was allocated to non-competition agreements. Pursuant

to the template established by Ravelston's agents, in both transactions KIPNIS inserted International and Inc. as non-compete covenantors, and proposed that the amount allocated to the non-competition agreement be split 75% to International and 25% to Inc. As in prior transactions, Inc. was included as a non-compete covenantor because KIPNIS, purportedly acting on behalf of International, inserted it as such. Neither Forum nor Paxton ever requested that Inc. be included as a non-compete convenantor.

18. It was further part of the scheme that KIPNIS signed the Forum and Paxton asset purchase agreements on behalf of International, and the non-competition agreements on behalf of both International and Inc. At the closings on or about September 30, 2000 (Forum) and October 2, 2000 (Paxton), KIPNIS caused $100,000 and $500,000, respectively, to be wire transferred to Inc. The decision in the Forum and Paxton transactions to include Inc. as a recipient of 25% of the funds allocated to the non-competition agreement, and the implementation of that decision, were breaches of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from these transactions. The $100,000 and $500,000 payments were thefts of International's corporate opportunities and fraudulent deprivations of honest services by all International agents who were involved. As in prior transactions, Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. The $100,000 and $500,000 payments to Inc. at International's expense were related party transactions. Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose these related party transactions to Interna-

tional's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

19. It was further part of the scheme that at the time of the Forum and Paxton transactions, Radler believed that, consistent with their plan, BLACK, BOULTBEE, ATKINSON and Radler had been inserted as non-compete covenantors by KIPNIS in the Forum and Paxton closing documents, and that 3% of the proceeds of each transaction had been set aside to fund the non-compete payments to the four International officers.

20. It was further part of the scheme that, in the spring of 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS realized that a portion of the proceeds from the Forum and Paxton transactions had not, in fact, been set aside from the transactions to fund the anticipated individual non-compete payments. Moreover, BLACK, BOULTBEE, ATKINSON and Radler had never been inserted as non-compete covenantors in the closing documents. After realizing the "mistake," Radler examined International's reserve accounts from the Forum and Paxton transactions – which had closed almost six months prior – and determined that $600,000 could diverted from those reserves and paid to BLACK, BOULTBEE, ATKINSON and Radler as non-competition payments.

21. It was further part of the scheme that on or about April 9, 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS caused a subsidiary of International to pay a total of $600,000 to BLACK, BOULTBEE, ATKINSON and Radler as "supplemental non-competition payments." The "supplemental non-competition payments" were made to the

defendants despite the fact that none of them had signed a non-competition agreement in connection with the Forum or Paxton transactions. These payments were thefts of International's corporate assets and fraudulent deprivations of honest services by all International agents who were involved. The payments to the individuals at International's expense also were related party transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

CNHI II

22. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS defrauded International in connection with the CNHI II transaction. On or about November 1, 2000, International sold additional newspapers to CNHI for approximately $90 million. Pursuant to the "template" established by Ravelston's agents, Inc. was inserted into the CNHI asset purchase agreement by KIPNIS as a non-compete covenantor. The asset purchase agreement, dated September 28, 2000, allocated $3 million of the purchase price to International and Inc.'s non-competition agreements – $2.25 million to International (75%) and $750,000 to Inc. (25%). Inc. was included as a non-compete covenantor because KIPNIS, purportedly acting on behalf of International, inserted it as such. As in the first CNHI transaction, however, CNHI had not requested that Inc. be included as a non-compete covenantor in the transaction.

23. It was further part of the scheme that in or about late October of 2000, several days before the

closing of the CNHI II transaction, KIPNIS, purportedly acting on behalf of International, advised CNHI representatives that International wanted to insert BLACK, BOULTBEE, ATKINSON and Radler as covenantors to the non-competition agreement (in addition to International and Inc.). CNHI agreed to allow the four individuals to be added to the non-competition agreement as covenantors, and the non-competition agreement was modified to reflect this fact. CNHI did not care if the number of covenantors was increased, so long as doing so did not increase CNHI's purchase price. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS were fully aware that CNHI had not requested that any individuals be added as covenantors to the non-competition agreement with International. CNHI representatives had not even heard of some of the International officers whom KIPNIS proposed adding as covenantors to the non-competition agreement.

24. It was further part of the scheme that, just prior to the closing, BLACK directed Radler to allocate approximately $9.5 million of the transaction proceeds to the non-competition agreements for BLACK, BOULTBEE, ATKINSON and Radler. Radler conveyed this directive to KIPNIS. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS were fully aware that the $9.5 million allocated to the individuals as compensation for non-competition agreements would have otherwise been paid to International as proceeds of the CNHI II transaction.

25. It was further part of the scheme that at the closing on or about November 1, 2000, KIPNIS signed the asset purchase agreement on behalf of International, and the non-competition agreements on behalf of International, Inc., BLACK, BOULTBEE,

ATKINSON and Radler. Although Inc. and the four International officers were added to the non-competition agreement solely at KIPNIS' request, the final non-competition agreement falsely stated that CNHI "was not willing to enter into the Purchase Agreement for the acquisition of the Newspapers unless Covenantor executes this Agreement." KIPNIS signed the non-competition agreement knowing full well that CNHI was willing to enter into the transaction without Inc. or the four individuals' non-compete agreement.

26. It was further part of the scheme that, at the closing on or about November 1, 2000, pursuant to Inc.'s non-competition agreement, KIPNIS caused $750,000 to be wire transferred to Inc. Furthermore, at the closing on or about November 1, 2000, KIPNIS attempted to convince CNHI to wire transfer the $9.5 million non-competition payment directly to BLACK, BOULTBEE, ATKINSON and Radler. CNHI refused, in part because it had never heard of BOULTBEE or ATKINSON. CNHI, however, agreed to allow KIPNIS to handwrite the names and disbursement amounts for the four International officers receiving non-compete payments on the bank's wiring instructions. KIPNIS subsequently arranged for the $9.5 million in non-compete payments to be sent to American Publishing Company, a subsidiary of International.

27. It was further part of the scheme that in late November 2000, KIPNIS caused an American Publishing Company subsidiary to issue checks totaling $9.5 million to BLACK, BOULTBEE, ATKINSON and Radler. At the same time, KIPNIS also caused an American Publishing Company subsidiary to issue a bonus check to himself in the amount of

$100,000. The decision in the CNHI II transaction to propose Inc. and the four International officers as recipients of the funds allocated to the non-competition agreement, and the implementation of that decision, were breaches of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $750,000 payment to Inc. and the $9.5 million payment to the four International officers were thefts of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston and its agents benefitted by this theft directly, and because they owned a greater percentage of Inc. than they did of International. The $750,000 payment to Inc. and the $9.5 million payment to the four International officers were both at International's expense and were related party transactions. Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

February 2001 Payments

28. It was further part of the scheme that, in February 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS fraudulently mischaracterized bonus payments to the four International officers as non-competition payments. The four International officers decided that they would pay themselves, purportedly on behalf of International, a bonus of $5.5 million. The four International officers further decided to label these payments as non-competition payments, rather than bonus compensation, in order

to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax laws.

29. It was further part of the scheme that KIPNIS helped implement this decision by preparing non-competition agreements between American Publishing Company (an International subsidiary) and each of the four International officers, and then signing the agreements on behalf of American Publishing Company. In the agreements, which were backdated to December 31, 2000, BLACK, BOULTBEE, ATKINSON and Radler each promised not to compete with American Publishing Company for three years after he left International's employ. These agreements were a contrivance created for the purpose of facilitating favorable tax treatment from the Canadian tax authorities. American Publishing Company was the subsidiary through which International had owned its United States community newspapers outside the Chicago area. By the time these agreements were signed, however, International had sold all of these newspapers but one – a small weekly newspaper in Mammoth Lake, California. International was in the process of attempting to sell that newspaper and had no intent of reentering the community newspaper business in the United States, and defendants knew that there was no legitimate justification for these non-competition agreements. BLACK, BOULTBEE, ATKINSON and Radler had signed a $5.5 million agreement not to compete in the newspaper business with a company that was, for all intents and purposes, no longer in the newspaper business.

30. It was further part of the scheme that, in or about February 2001, BLACK, BOULTBEE,

ATKINSON, Radler and KIPNIS caused an American Publishing Company subsidiary to issue checks totaling $5.5 million to BLACK, BOULTBEE, ATKINSON and Radler. KIPNIS arranged for the delivery of the cheeks which, like the non-competition agreements, were backdated to December 31, 2000. The issuance of these checks, as well as the preparation and signing of the fraudulent non-competition agreements, were breaches of the fiduciary duty owed by BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS because they were benefitting themselves to the detriment of International. These payments were fraudulent deprivations of International's right to receive honest services from its officers, directors and controlling shareholder. The payments to the individuals at International's expense also were related party transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to investigate and fully disclose the actual nature of these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

32. It was further part of the scheme that defendants and their co-schemers used the United States mail, commercial interstate couriers and the interstate wires to execute the scheme. For example, KIPNIS sent transaction documents to others by interstate facsimile, e-mail and commercial interstate couriers. Money was wire transferred in interstate commerce. Checks were delivered by commercial interstate carriers. KIPNIS sent out packages of materials to the International Audit Committee by facsimile, e-mail and commercial interstate carriers.

33. It was further part of the scheme that defendants and their co-schemers did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts, beyond those acts of concealment set forth above.

34. On or about February 8, 2001, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemer F. David Radler, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to ATKINSON in Toronto, Canada, to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelope contained Noncompetition Agreements with American Publishing Company to be executed by certain International officers, and approximately $2.9 million in checks as consideration for those agreements;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT TWO

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of

Count One of this Indictment as though fully set forth herein.

2. On or about August 19, 2000, at Chicago, in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to the attorney for Forum Communications Inc. in Fargo, North Dakota, to be sent and delivered by an interstate carrier, namely: Federal Express, according to the directions thereon, which envelope contained a transaction documents relating to International's September 30, 2000 sale of certain newspapers to Forum, including a Noncompetition Agreement, wire transfer instructions for the Noncompetition Agreement and an Asset Purchase Agreement;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT THREE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about September 5, 2000, at Chicago, in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Nashville, Tennessee, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: an e-mail transmission of a draft Asset Purchase Agreement for International's October 2, 2000 sale of certain newspapers to PMG Acquisition Corp. ("Paxton");

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT FOUR

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about October 24, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Charlotte, North Carolina, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile transmission wire transfer instructions for the proceeds of Inter-

national's November 1, 2000 sale of certain newspapers to CNHI;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT FIVE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about November 21, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained a "non-competition" payment, in the form of a check made payable to Radler in the amount of $4,300,000;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SIX

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this indictment as though fully set forth herein.

2. On or about March 1, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained Non-Competition Agreements with American Publishing Company executed by certain International officers;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SEVEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about April 9, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, knowingly did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained "non-competition payments" in the form of checks totaling $600,000 made payable to BLACK, Radler, BOULTBEE and ATKINSON;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT EIGHT

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. In 2000, International sold several hundred Canadian newspapers, an internet investment called Canada.com, and a fifty percent interest in the *National Post* to CanWest Global Communications Corp. The purchase price was approximately $2.1 billion (Cdn. $3.2 billion). The negotiations began in or about May 2000. The transaction agree-

ment was dated July 30, 2000. The transaction closed on or about November 16, 2000. Approximately 2/3 of the assets sold were owned solely by International.

b. BLACK negotiated the CanWest transaction. BOULTBEE, ATKINSON and KIPNIS participated in reviewing and finalizing the transaction. The transaction included non-competition agreements signed by International and others. The transaction documents for the CanWest transaction allocated approximately $51.8 million (Cdn. $80 million) to the non-competition agreements.

c. In connection with the non-competition agreements in the CanWest transaction, the fiduciary duty of loyalty owed by BLACK, BOULTBEE, ATKINSON, KIPNIS, and Ravelston to International required each of them to use their skill and ability to maximize International's share of the proceeds allocated to the non-competition agreement and to refrain from acting to International's detriment. If one of International's controlling shareholders, officers or directors received a portion of the proceeds allocated to the non-competition agreement, all of the above-named defendants and Radler, as well as any other knowledgeable officer, director or controlling shareholder of International, had a fiduciary duty to truthfully disclose all material facts to International's Audit Committee, and to refrain from making any false or fraudulently misleading statements, so that the independent directors could review the transaction and ensure its fairness to International.

General Scheme Allegations

3. Beginning no later than in or about May 2000 and continuing thereafter until at least in or

about May 2002, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions, in connection with the CanWest transaction. This scheme is further described below.

4. It was part of the scheme that, in connection with the CanWest transaction, BLACK, BOULTBEE and ATKINSON fraudulently inserted BOULTBEE and ATKINSON as non-compete covenantors and fraudulently caused approximately $51.8 million (Cdn. $80 million) of the sale proceeds to be allocated to the non-competition agreements. BLACK, BOULTBEE, ATKINSON, KIPNIS, and Ravelston failed to properly disclose this self-dealing to International's Audit Committee, and caused false and misleading statements to be made to International's independent directors about the non-competition payments. Although International was the seller and signed a non-competition agreement, and International's Audit Committee was told that International would receive $2.6 million (Cdn. $4 million) for this agreement, the defendants caused all $51.8 million (Cdn. $80 million) – plus interest – to be distributed to BLACK, Radler, BOULTBEE, ATKINSON

and Ravelston. International received nothing for its non-competition agreement. After an outside attorney discovered and questioned these payments during the course of a due diligence inquiry, BLACK, BOULTBEE, ATKINSON and KIPNIS returned to International's Audit Committee and sought ratification of the payments on different grounds, claiming that the information previously provided to the directors misdescribed the transaction in a number of "inadvertent" respects. In fact, the previous submission's falsehoods had not been inadvertent, and the second submission was false and misleading as well. After International's independent directors ratified these payments, BLACK then lied to International's shareholders about the payments at International 2002 annual shareholder meeting. As a result of this scheme, defendants and their co-schemers fraudulently diverted approximately $51.8 million (Cdn. $80 million) from International, and fraudulently deprived International of its right to receive their honest services.

CanWest

5. It was further part of the scheme that, on or about July 28, 2000, BLACK, BOULTBEE and ATKINSON fraudulently caused BOULTBEE and ATKINSON to be inserted into the CanWest transaction agreement as non-compete covenantors, and fraudulently caused approximately $51.8 million (Cdn. $80 million) of the sale proceeds to be allocated to the non-competition agreements. Prior to this date, CanWest had requested only that International, Ravelston, BLACK and Radler sign non-competition agreements, and the transaction agreement had not allocated any of the sales proceeds to such agreements. At the defendants' direction, the

$51.8 million (Cdn. $80 million) that was allocated to the non-competition agreements was taken out of the proceeds that were to be paid to International as compensation for the newspapers that it was selling to CanWest.

6. It was further part of the scheme that BLACK, BOULTBEE and ATKINSON agreed that BOULTBEE and ATKINSON would be inserted as non-compete covenantors, and as recipients of non-competition fees, as a mechanism for causing International to pay them a bonus. Until this time, International had never paid BOULTBEE or ATKINSON a bonus; all of their compensation had been paid by Ravelston and funded by the management fees. The defendants decided to label these payments as non-competition payments, rather than bonus compensation, in order to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax laws.

7. It was further part of the scheme that, on or about September 1, 2000, KIPNIS prepared and sent a memorandum to International's Audit Committee about the related party issues arising from the CanWest transaction ("the September memorandum"). The September memorandum was false and fraudulent in several respects:

- The September memorandum stated that $32.4 million (Cdn. $50 million) had been allocated to the non-competition agreements. In fact, the transaction agreement had allocated $51.8 million (Cdn. $80 million) to the non-competition agreements.
- The September memorandum stated that ATKINSON and BOULTBEE had been requested to execute non-competition agree-

ments. In fact, CanWest had not requested that ATKINSON and BOULTBEE sign non-competition agreements they had been inserted by the defendants.

- The September memorandum stated that International would be paid $2.6 million (Cdn. $4 million) for its non-competition agreement. In fact, International received nothing for its non-competition agreement.

- The September memorandum proposed that Ravelston be paid $19.4 million (Cdn. $30 million) as a "Management Agreement Break-Up Fee" (hereinafter referred to as "the break fee"). The memorandum stated that the break fee was appropriate because "Ravelston has a long term management agreement in place" with International, Ravelston had agreed to reduce its "ongoing" management fee which had the effect of increasing International's sale proceeds (because the sale proceeds were reduced by a multiple of the management fee going forward), and Ravelston had consented "to CanWest having an early termination of its management agreements." In fact, the CanWest transaction agreement did not refer in any way to a "management agreement break-up fee" – the money to be paid to Ravelston as a break fee was allocated in the transaction agreement to the non-competition agreements. Moreover, Ravelston's management agreement with International was not long-term; it provided that each year International's Audit Committee would decide whether to continue with Rav-

elston as its source of management services. Thus, Ravelston had no right to an "ongoing" management fee that it might forego. As for CanWest's right to terminate its management agreement with Ravelston, the memorandum failed to disclose that, if CanWest did so, CanWest would have to pay Ravelston $29.1 million (Cdn. $45 million) whereas Ravelston had no right to any payment if International terminated its management agreement with Ravelston.

8. It was further part of the scheme that, at the Audit Committee meeting on September 11, 2000, KIPNIS, in addition to not correcting the false statements and material omissions set forth in paragraph 7, made additional false statements in support of the non-competition fees and the break fee.

- KIPNIS stated that CanWest had originally insisted on BLACK and Radler each receiving $16.8 million (Cdn. $26 million) for their non-competition agreements; in fact, CanWest never insisted that any non compete covenantor receive any money.
- KIPNIS stated that BLACK and Radler had negotiated so that "Cdn $12 million be reallocated [from the money that CanWest had purportedly require BLACK and Radler to receive] to cover bonuses for senior management, which reallocation would save the Company additional bonus costs." In fact, there were no negotiations with CanWest about the allocation of the non-competition fees, and senior management received their bonuses from Ravelston, not International.

- KIPNIS stated that the break fee was justified because Ravelston had willingly reduced its management fees from International for the year 2000, which had the effect of increasing International's sale proceeds from CanWest. In fact, Ravelston did not reduce its management fee for the year 2000 and never contemplated doing so. Moreover, even it had, doing so would have had no impact on the amount of International's sales proceeds from CanWest because the amount of Ravelston's management fee from International in 2000 was irrelevant; the sale proceeds were affected only by the amount of Ravelston's management fee from CanWest from 2001 forward.

The Audit Committee approved the non-competition fees and break fee as presented. At a meeting of the board of directors on the same day, with ATKINSON, BOULTBEE and KIPNIS present, the board approved the payments after the chairman of the Audit Committee summarized the information that had been presented to the Audit Committee, including several of the false statements set forth above.

9. It was further part of the scheme that, on or about November 16, 2000, the CanWest transaction closed and Ravelston, BLACK, Radler, BOULTBEE and ATKINSON signed non-competition agreements and caused approximately $52.8 million (Cdn. $81.7 million) to be disbursed to themselves – approximately $11.9 million (Cdn. $18.4 million) each to BLACK and Radler, approximately $1.3 million (Cdn. $2 million) each to BOULTBEE and ATKINSON, and approximately $26.4 million (Cdn. $40.9 million) to Ravelston. The extra million dollars

(Cdn. $1.7 million) was interest to November 16, 2000 from July 30, 2000 – the date of the transaction agreement – which provided that CanWest would pay International interest from the date that the transaction agreement was signed. The exact amounts were distributed pursuant to the terms of a memorandum that was sent by facsimile from International's Treasurer in New York City to the bank in Toronto. Although the Audit Committee had been told that International would receive $2.6 million (Cdn. $4 million) for its non-competition agreement, it in fact received nothing. Before ATKINSON and BOULTBEE were inserted as non-compete covenantors, the transaction documents negotiated by the parties stated that the non-competition agreements were a condition of closing imposed by CanWest, which was true as to the non-competition covenantors identified at that time. After the defendants inserted ATKINSON and BOULTBEE to the list of non-competition covenantors, this language was not changed, even though the language did not apply to ATKINSON and BOULTBEE. BLACK, BOULTBEE and ATKINSON knew that the transaction documents were false to the extent that they stated that CanWest had conditioned the closing on receipt of non-competition agreements from BOULTBEE and ATKINSON.

10. It was further part of the scheme that, at a meeting of the International board of directors on December 4, 2000, BLACK discussed the CanWest transaction and failed to disclose any of the false statements and material omissions set forth in paragraphs 5 through 9. In spite of their fiduciary duties to International, BOULTBEE, ATKINSON and KIPNIS, all of whom attended the meeting, also

failed to disclose any of the false statements and material omissions relating to the payments.

11. It was further part of the scheme that, in the press release about the CanWest transaction, BLACK, BOULTBEE, ATKINSON and KIPNIS failed to disclose the payments to Ravelston, BLACK, Radler, BOULTBEE and ATKINSON. The payments also were not disclosed in International's Form 10-K or its proxy statement, both of which were filed in early 2001. In or about April 2001, an attorney for a lender, who also represented International on other matters, discovered these payments in the course of doing due diligence in connection with a proposed loan to International. The lender attorney opined that International needed to disclose these payments in a filing with the SEC.

12. It was further part of the scheme that, following the additional scrutiny prompted by the lender attorney, BLACK, BOULTBEE, ATKINSON and KIPNIS decided to alter the paper record on which the CanWest payments were approved. The defendants sought ratification of the payments from the Audit Committee and the Board of Directors based on a memorandum, dated May 1, 2001 ("the May memorandum"). The stated purpose of the May memorandum, which was submitted to the Audit Committee and the entire Board, was to correct certain "inadvertent" inaccuracies in the information that had been provided to the Audit Committee and the Board in September 2000, and to set forth all relevant facts about those payments so that the independent directors might ratify the payments on a full and accurate record. In fact, the May memorandum, while it corrected some of the prior falsehoods, exacerbated the fraud on the independent directors

by adding new false and fraudulently misleading statements and by failing to correct many of the prior falsehoods. The May memorandum was signed by KIPNIS, but was reviewed by all defendants. The May memorandum was false and misleading as follows:

- The May memorandum stated that the September 2000 representations about the break fee for Ravelston and bonuses for senior management were "inadvertent" deviations from the CanWest transaction documents, which only referred to money allocated for non-competition agreements. In fact, the break fee justification and the bonus references were not "inadvertent." Throughout the negotiation of the CanWest transaction, BLACK, ATKINSON and BOULTBEE had contemplated that part of the non-competition consideration would he paid to Ravelston as a break fee, and that the payments to ATKINSON and BOULTBEE were bonuses.

- The May memorandum stated that "CanWest's obligation to consummate the transaction was conditional on its receipt at the closing of non-competition agreements in a prescribed form by certain parties specified by it in the Transaction Agreement," including BOULTBEE and ATKINSON, and that "[t]o satisfy this critical closing condition," BOULTBEE and ATKINSON signed non-competition agreements. In fact, CanWest did not specify that BOULTBEE and ATKINSON sign non-competition agreements. Although the transaction document

contained pre-existing language stating the agreements were a condition of closing, in fact, as defendants well knew, they had inserted BOULTBEE and ATKINSON as non-competition covenantors, and neither party had changed the pre-existing language to address that fact – CanWest because it did not care enough to do so, and the defendants because they wanted to create the false impression that the agreements signed by BOULTBEE and ATKINSON were closing conditions and that their non-competition agreements were genuine.

- The May memorandum stated that the "Non-Competition Consideration paid by CanWest to the individual Obligors [BLACK, Radler, BOULTBEE and ATKINSON] does not, and because it was paid by CanWest cannot, have the character of compensation to the recipients thereof contrary to a comment which so suggests in the September 11th Audit Committee meeting." In fact, the "Non-Competition Consideration" was not paid by CanWest to the individual Obligors. CanWest paid this money to International, which disbursed it to the defendants at their direction. Moreover, until BLACK, BOULTBEE and ATKINSON decided that $51.8 million (Cdn. $80 million) of the sale proceeds would be allocated to the "Non-Competition Consideration," all of the $51.8 million (Cdn. $80 million) was earmarked for International as sales proceeds for the newspapers that it was selling. Furthermore, as to ATKINSON and BOULTBEE, the payments were in fact compensation in the form of bonuses from In-

ternational. Thus, International "paid" the non-competition consideration in every sense of the word.

- The May memorandum stated that "the Non-Competition Consideration was established in the Transaction Agreement and reflected the value attributed by CanWest to the Obligors' non-competition agreements." In fact, the $51.8 million (Cdn. $80 million) that was set aside for the "Non-Competition Consideration" did not reflect the value attributed by CanWest to the non-competition agreements. That amount was chosen unilaterally by the defendants and inserted into the Transaction Agreement at their request. CanWest did not object to the defendants' proposal because the allocation of a portion of the purchase price to the non-competition agreements was irrelevant to CanWest – CanWest was paying the same total amount regardless.

- The May memorandum stated that "the amount of the Non-Competition Consideration relative to the sale price of the assets sold by the Corporation to CanWest, being approximately 2.5%, is consistent with the amount of payments made for non-competition covenants in several recent asset sales by the Corporation." In fact, in recent asset sales, substantially more than 2.5% of the sale price had been allocated to non-competition payments because BLACK, Radler, BOULTBEE and ATKINSON had decided to insert themselves as non-competition covenantors and to pay themselves non-

competition fees from proceeds that otherwise would have been paid to International. Thus, for example, in the CNHI II deal (which had closed in November 2000, the same month as the CanWest transaction), the amount paid for non-competition covenants was greater than 10% of the sale price because BLACK, Radler, BOULTBEE and ATKINSON had decided to pay themselves $9.5 million in fraudulent non-competition fees. When the defendants went back to the Audit Committee in May 2001 for ratification of CanWest payments originally approved in September 2000, they had a fiduciary obligation to disclose to the Audit Committee that in November 2000, February 2001 and April 2001, they had fraudulently obtained approximately $15 million in non-competition fees in connection with the U.S. Community asset sales. By failing to do so, defendants breached their fiduciary duties to International and the public majority shareholders.

- The May memorandum failed to disclose: that the September memorandum had represented that International would receive $2.6 million (Cdn. $4 million) for its non-competition agreement, but in fact received nothing.

On May 1, 2001, KIPNIS sent the May memorandum by facsimile to the Chairman of International's Audit Committee in London, England. On May 4, 2001, KIPNIS and Radler spoke by telephone with the Chairman of the Audit Committee about the May memorandum and the purported "inaccuracies" in International's minutes relating to the CanWest

transaction. On May 4, 2001, KIPNIS sent the May memorandum by overnight mail to the members of International's Audit Committee.

13. It was further part of the scheme that, at a meeting of International's Audit Committee on May 14, 2001, KIPNIS discussed the May memorandum. According to minutes of the meeting prepared by KIPNIS, he told that Audit Committee that: "In reviewing the minutes [relating to the September 2000 approval of the CanWest non-competition payments], we found that in a number of inadvertent respects, the minutes did not accurately reflect the CanWest transaction. All of the amounts originally considered by the Audit Committee and the Board were correct, both absolutely and relative to the size of the transaction." Both representations were false. The inaccuracies in the prior minutes were not inadvertent, and the amounts originally considered in September 2000 included $2.6 million (Cdn. $4 million) that was earmarked for International; but in the amounts ratified in May 2001, the $2.6 million (Cdn. $4 million) that was originally supposed to go to International instead went to Ravelston. Based on these oral misrepresentations and the misrepresentations in the May memorandum, the Audit Committee ratified the payment of the "Non-Competition Consideration" in the CanWest transaction to Ravelston, BLACK, Radler, BOULTBEE and ATKINSON.

14. It was further part of the scheme, on May 14, 2001, KIPNIS prepared a memorandum for use by the Chairman of the Audit Committee when he made his report to the full Board about the Audit Committee's ratification of the CanWest payments. The memorandum was copied to ATKINSON. In the

May 14, 2001 memorandum, KIPNIS repeated the falsehood that "[i]n a number of inadvertent respects, the material reviewed in connection with the September 11 Audit and Board meetings did not accurately reflect the CanWest transaction," as well as the false statement that "[a]ll of the amounts originally considered by the committee and board were correct – both absolutely and relative to the size of the transaction." At a meeting of the full Board of Directors of International on May 17, 2001, the Chairman of the Audit Committee, when discussing the proposed ratification of the CanWest payments, repeated the falsehoods that KIPNIS had provided to him. Based on these falsehoods, as well as the false statements in the May memorandum, the independent directors on the full Board ratified the CanWest non-competition payments. BLACK, BOULTBEE, ATKINSON and KIPNIS attended the Board meeting. Each knew that the May memorandum was false and fraudulent, and that the independent directors had been lied to about the money that supposedly was to be paid to International, but was not. None of them corrected any of the false information that was provided to the independent directors.

CanWest Disclosures to Shareholders

15. It was further part of the scheme that, on or about May 15, 2001, International filed a Form 10Q with the SEC. The 10Q discussed the non-competition fees in the CanWest transaction. BLACK, BOULTBEE and ATKINSON caused the 10Q to falsely state that the non-competition agreements signed by BOULTBEE and ATKINSON were "required by CanWest as a condition of the transaction." The 10Q also failed to disclose: (1) that BLACK, BOULTBEE and ATKINSON had fraudu-

lently diverted the money that was used to pay the non-competition fees from International to themselves; and (2) that BLACK, BOULTBEE, ATKINSON and KIPNIS had twice obtained Audit Committee and Board approval of these payments by fraud. The defendants caused a similar false and fraudulent disclosure to be included in International's 2001 Form 10-K, which was filed with the SEC in March 2002.

16. It was further part of the scheme that, at International's annual shareholder meeting on May 23, 2002, BLACK made numerous false and fraudulent statements about the CanWest non-competition payments, as follows:

- In response to a question expressing concern about the level of non-competition payments by International to BLACK and others, BLACK responded: "The answer is that it was in our opinion not technically speaking a reduction of the compensation paid to this company. The consideration was not reduced there by the acquirer in the principle case that you're referring to, the CanWest deal." This was false. Until BLACK, BOULTBEE and ATKINSON decided that $51.8 million (Cdn. $80 million) of the sale proceeds would be allocated to the "Non-Competition Consideration," all of that money was earmarked for International as compensation for the newspapers that it was selling.

- BLACK also stated:

  And Mr. Asper [CanWest's executive chairman] demanded that there be a non-compete arrangement and effectively the independent directors of this company determined that

since he wished – that it was something that he was paying valuable consideration for and some of that should come to us and not this company. And that was not a matter negotiated directly by us. And, I suppose there's room for debate here, but in all circumstances, the independent directors did what they thought was best.

This statement was false and fraudulent because: (1) CanWest did not demand that BOULTBEE and ATKINSON sign non-competition agreements; (2) the non-competition payments were not negotiated by the independent directors; BLACK, BOULTBEE and ATKINSON determined the amounts of the payments and to whom they would be made; (3) CanWest did not consider itself to he "paying valuable consideration for" the non-competition agreements; CanWest was indifferent to the amount allocated to the non-competition agreements, which was determined by BLACK, BOULTBEE and ATKINSON; (4) all, not "some," of the non-competition consideration was paid to BLACK, Radler, BOULTBEE, ATKINSON and Ravelston; none was retained by International; and (5) the approval of the independent directors was obtained by fraud.

17. It was further part of the scheme that defendants and their co-schemers used the United States mail, commercial interstate couriers and the interstate wires to execute the scheme. For example, KIPNIS sent transaction documents to others by interstate facsimile, e-mail and commercial interstate couriers. Money was wire transferred in interstate

commerce. KIPNIS sent out packages of materials to the International Audit Committee by facsimile, e-mail and commercial interstate carriers. International wired its filings to the SEC in Washington, D.C.

18. It was further part of the scheme that defendants and their co-schemers did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts beyond those acts of concealment set forth above.

19. On or about May 1, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate and foreign commerce from Chicago, Illinois, to London, England, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a letter and the May Memorandum;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT NINE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 18 of Count Eight of this Indictment as though fully set forth herein.

2. On or about May 4, 2001, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, envelopes addressed to members of the International Audit Committee in New York and Washington, D.C., to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelopes contained a memorandum relating to the non-competition payments in the CanWest transaction;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT TEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. International leased a jet airplane that BLACK was authorized to use for company business. International also paid for entertainment expenses incurred by BLACK for the purpose of promoting International's business. In addition, International owned an apartment at 635 Park Avenue, Second Floor, New York, New York ("the Second Floor

Apartment"), which BLACK was authorized to use when he was in New York City. A subsidiary purchased the Second Floor Apartment in December 1994 for $3 million. BLACK was given an option to purchase the Second Floor Apartment, including any capital improvements or furnishings of the apartment paid for by the company, at a price equal to the then aggregate fair market value thereof, payable in cash at the closing of the purchase. BLACK's use of this apartment and his option to purchase it were disclosed to International's Audit Committee.

b. The option agreement provided that International would pay for "all closing costs and all capital improvements, decorating and furnishings needed, as agreed between BLACK and the Company, to put the Apartment into appropriate habitable condition for the uses contemplated by BLACK and the Company." In 1996, however, BLACK made plans to spend more than $2 million to, among other things: (1) reduce the number of bedrooms from six to three; and (2) decorate the apartment in lavish fashion. By this point, several significant shareholders had complained about the company spending $3 million on an apartment in New York City for use by an executive who was a Canadian citizen and, for tax reasons, could only spend a limited number of days each year in the United States. Because shareholders were complaining about the company's purchase of the apartment, BLACK and the company agreed that BLACK would pay for his proposed renovation of the apartment. This did not change the terms of the option agreement. There was never any discussion about International reimbursing BLACK for this expense, or that BLACK's payment thereof created any loan from BLACK to the company. The International employee with whom

BLACK reached this agreement was an executive referred to herein as "Executive B," who was the person at International who was responsible for dealing with shareholder complaints. Executive B worked out of International's office in New York City.

c. In January 1998, BLACK purchased the Ground Floor Apartment at 635 Park Avenue, New York, New York ("the Ground Floor Apartment"), for approximately $499,000. In 1998 and 1999, while BLACK owned the apartment, International paid more than $1.5 million for a total renovation of the Ground Floor Apartment. Among other things, the Ground Floor Apartment was converted into three distinct living spaces. BLACK's servants, among others, thereafter stayed in the Ground Floor Apartment. BLACK paid little, if anything, toward the renovation of the Ground Floor Apartment.

d. As a controlling shareholder, officer and director of International, BLACK had a fiduciary duty of undivided loyalty to International, which among other things, required BLACK to refrain from acting to benefit himself or anyone else at International's expense, to disclose all material facts to International's independent directors regarding any transactions involving himself and International, and to abide by the determination of such independent directors as to the fairness of the transaction.

General Scheme Allegations

3. Beginning no later than in or about May 1998 and continuing thereafter until at least in or about August 2002, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions. This scheme is further described below.

4. It was part of the scheme that BLACK, with BOULTBEE's assistance, repeatedly abused the perquisites provided to BLACK by International for the purpose of benefitting BLACK at the expense of the corporation and its public majority shareholders. BLACK exacerbated these breaches of fiduciary duty by determining himself what the corporation would pay to him, or on his behalf, and failing to present the related party transactions between himself and the company to International's Audit Committee. As a result, BLACK fraudulently obtained millions of dollars from International, and he and BOULTBEE fraudulently deprived International of its right to receive their honest services.

Bora Bora Vacation

5. It was further part of the scheme that, in the summer of 2001, BLACK fraudulently caused International to pay for his use of International's corporate jet to transport himself and his wife on a personal vacation to Bora Bora in French Polynesia. BLACK and his wife left Seattle for Bora Bora on July 30, 2001, and returned to Seattle on August 8, 2001, logging a total of 23.1 hours in flight. There

was little, if any, business purpose to this vacation, which cost International tens of thousands of dollars.

6. It was further part of the scheme that BLACK failed to bring his use of International's corporate jet for his Bora Bora vacation to the attention of International's Audit Committee, thus breaching his fiduciary duty and depriving International of his honest services. Instead, BLACK took it upon himself to determine who should bear the cost of his personal use of International's corporate jet. When International's accountants sought to have him reimburse International for this cost, BLACK refused, stating in an August 2002 e-mail to ATKINSON that "[n]eedless to say, no such outcome is acceptable."

7. It was further part of the scheme that, to conceal his breach of fiduciary duty, BLACK failed to disclose International's underwriting of his Bora Bora vacation in International's 2002 proxy statement. The proxy statement purported to disclose all of the compensation that BLACK received from International in 2001, including International's payment of BLACK's personal expenses, but it contained no mention of Black's personal use of International's corporate jet. As chief executive officer, BLACK signed International's 2002 proxy statement, which was filed with the SEC on April 4, 2002, by wire from Chicago.

The Birthday Party

8. It was further part of the scheme that, in December 2000, BLACK fraudulently caused International to pay more than $40,000 for his wife's surprise birthday party. The party occurred on December 4, 2000, at La Grenouille restaurant in New York City. The party cost approximately $62,000; related expenses included 80 dinners at $195 per person,

and $13,935 for wine and champagne. The party was a social occasion with little, if any, business purpose. Yet BLACK, without any disclosure or consultation with International's Audit Committee, determined that International would pay approximately $42,000 for the party; and that he would pay only $20,000.

The New York City Apartments

9. It was further part of the scheme that BLACK and BOULTBEE defrauded International of millions of dollars, as well as its right to receive their honest services, in connection with International's renovation of the Ground Floor Apartment, and his purchase from International of the Second Floor Apartment.

10. It was further part of the scheme that, starting in or about May 1998 and continuing until in or about September 1999, BLACK caused International to expend more than $1.5 million to renovate the Ground Floor Apartment, which at that time was owned by BLACK. Among other things, the Ground Floor Apartment was converted into three distinct living spaces. One of the purposes of this was to create living spaces for BLACK's servants, so that they would be proximate to the Second Floor Apartment. Indeed, one of the reasons that BLACK purchased the Ground Floor Apartment was so that his servants would have a place to live near the Second Floor Apartment. After the renovation was complete, BLACK's servants often resided in the Ground Floor Apartment when BLACK was in New York City. International's directors and employees, as well as others, also stayed in the Ground Floor Apartment.

11. It was further part of the scheme that BLACK concealed the fact that International had

paid for the renovation of his Ground Floor Apartment by causing International to make false statements in its proxy statements about these payments. International's 1999 proxy statement described the Second Floor Apartment that International had purchased for BLACK's use in 1994, and then stated that International in 1998 had paid $957,722 for "building out and maintaining" that apartment. International's 2000 proxy statement again referred to the Second Floor Apartment, and stated that International in 1999 had paid $143,500 for "building out and maintaining" that apartment. In fact, the "building out" expenses referred to in both proxy statements related to the Ground Floor Apartment; there was no significant construction done on the Second Floor Apartment in 1998 or 1999. BLACK signed both proxy statements on behalf of International.

12. It was further part of the scheme that, in or about December 2000, BLACK and BOULTBEE defrauded International of millions of dollars, as well as its right to receive their honest services, in connection with BLACK's purchase from International of the Second Floor Apartment.

13. It was further part of the scheme that, after BLACK fraudulently obtained millions of dollars in non-competition fees from the CNHI II and CanWest transactions in November 2000, BLACK decided to purchase the Second Floor Apartment, and that the price that he would pay would be the same that the company had paid for it six years earlier – $3 million. In order to justify that price, BLACK and BOULTBEE falsely stated to Executive B that the option agreement allowed BLACK to purchase the apartment at International's "cost."

14. It was further part of the scheme that, a short while later, BOULTBEE telephoned Executive B and told him that BLACK would purchase the Second Floor Apartment for $3 million, suggested that this was the "market value" in light of BLACK's payment for the renovation, and directed Executive B to write a memorandum memorializing this transaction after calling Executive B's friends in real estate to confirm the $3 million amount. BOULTBEE did not explain why he had earlier stated that BLACK's option was at "cost," but he was now talking about "market value" as the basis for BLACK's exercise of the option. BOULTBEE also did not explain how he and BLACK had reached the conclusion that International's beneficial interest in the Second Floor Apartment, which the company had purchased in 1994, had not appreciated at all in six years in the booming Upper East Side real estate market. Notwithstanding these facts, Executive B did as he was told because: (1) BLACK and BOULTBEE had told him that BLACK's option, notwithstanding the references to "fair market value," was at cost; (2) it was clear that BLACK did not intend to pay more than $3 million; and (3) Executive B very much wanted the proposed transaction to go forward because it would result in some money going back to the company and would defuse the shareholder complaints about the apartment, which had continued over the years.

15. It was further part of the scheme that, a short time later, BOULTBEE told Executive B that BLACK would pay the $3 million for the Second Floor Apartment by tendering to the company $2,150,000 in cash, along with BLACK's interest in the Ground Floor Apartment, which BOULTBEE said had a fair market value of $850,000.

BOULTBEE did not explain this valuation, or the inconsistency between the lack of appreciation of International's interest in the Second Floor Apartment and the sizable appreciation attributed to BLACK's interest in the Ground Floor Apartment.

16. It was further part of the scheme that Executive B thereafter had brief, superficial conversations with some New York City real estate specialists and then wrote a memorandum to KIPNIS which stated:

> After in-depth discussions with various New York City real estate specialists and meetings with Jack Boultbee, it has been agreed that the fair market value of Apartment 2, at the above address, is US $3,000,000. The fair market of the Ground Floor apartment at the same address is US $850,000.

The memorandum was false in that: (1) Executive B's conversations with the real estate specialists in fact were brief and superficial; (2) the fair market value of International's interest in the Second Floor Apartment substantially exceeded $3 million; and (3) there was no basis for claim that the fair market value of BLACK's interest in the Ground Floor Apartment was $850,000, other than BOULTBEE's unsubstantiated representation to that effect. As directed, Executive B sent a copy of the memorandum to BOULTBEE. An attorney prepared a transfer agreement called an "Instrument of Transfer and Declaration of Trust," that was dated as of December 29, 2000.

17. It was further part of the scheme that, on or about January 23, 2001, BLACK and International, by Executive B, signed the "Instrument of Transfer and Declaration of Trust," pursuant to which BLACK acquired International's interest in the Second Floor

Apartment for $3,000,000. In this document, BLACK and Executive B "agreed" that "the fair market value" of International's "beneficial interest" in the Second Floor Apartment was $3,000,000. The document provided that BLACK would pay this amount by tendering $2,150,000 in cash to International, and by transferring to International the beneficial interest in the Ground Floor Apartment, which BLACK and Executive B "agreed" had a "fair market value" of $850,000.

18. It was further part of the scheme that the "agreed" fair market value for the Second Floor Apartment was a sham. In addition to the substantial increase in property values between 1994 and 2000, International had spent during that time period more than $400,000 on capital improvements for the Second Floor Apartment. Regardless of how much of his own money BLACK spent on the Second Floor Apartment, International's beneficial interest in the apartment was worth substantially more than $3,000,000 in December 2000.

19. It was further part of the scheme that BLACK'S payment to International for the Second Floor Apartment also involved fraud. The $2,150,000 that BLACK paid in cash was funded by his non-competition fees from the CNHI II and CanWest transactions, which BLACK had obtained in November 2000 by fraud, as set forth in Counts One through Nine. BLACK wire transferred the $2,150,000 to International on or about December 22, 2000. In addition, the 70% increase in the fair market value ascribed to BLACK's beneficial interest in the Ground Floor Apartment (where International had paid more than $1.5 million for improvements) was inconsistent with the 0% increase ascribed to In-

ternational's beneficial interest in the Second Floor Apartment (where BLACK had spent substantial sums on renovation).

20. It was further part of the scheme that BLACK breached his fiduciary duty by not bringing the December 2000 transaction before the International Audit Committee for its approval. The option agreement required that BLACK pay the company "fair market value" and cash consideration for Second Floor Apartment. BLACK did neither – he paid International only its initial cost, and his purchase payment included the transfer to International of the Ground Floor Apartment. Moreover, both apartments had been substantially renovated since they had been purchased, with International paying for the renovations to the Ground Floor Apartment that had been owned by BLACK, and BLACK paying for improvements to the Second Floor Apartment that had been owned by the company. Under these circumstances, in order for BLACK to purchase the Second Floor Apartment in December 2000 under the terms proposed, BLACK's fiduciary duties required that he disclose all material facts regarding his proposed purchase to International's independent directors, and to abide by their determination as to the fairness of the transaction. BLACK failed to do so; the material facts regarding his December 2000 purchase of the Second Floor Apartment were not presented to the independent directors of International. By so acting, BLACK breached his fiduciary duties to International and its public, majority shareholders, and fraudulently deprived them of his honest services.

21. It was further part of the scheme that BLACK concealed his fraud in connection with the

December 2000 transaction by causing International to omit material facts regarding the transaction in its 2001 proxy statement. The proxy statement was submitted to the SEC by wire from Chicago to Washington, D.C., on or about March 27, 2001. With respect to BLACK's option to purchase the Second Floor Apartment, the proxy statement stated that International previously had granted to BLACK an option to acquire at any time International's interest in the Second Floor Apartment, at its "then fair market value[]. . . . Effective December 29, 2000, Mr. Black exercised his option to purchase." The proxy statement was fraudulent in that it failed to disclose that BLACK had not paid "fair market value" for the Second Floor Apartment, that he had not paid cash consideration as required by the option agreement, and that he had not obtained the required, fully-informed approval of this transaction from the independent directors of International. This same fraudulent statement was repeated in International's 2002 proxy statement, which was filed with the SEC on or about April 4, 2002. BLACK signed the proxy statements on behalf of International, and BOULTBEE reviewed them before they were filed with the SEC.

22. It was further part of the scheme that, after International acquired the Ground Floor Apartment in December 2000, BLACK caused his servants to stay there, rent-free, on multiple occasions. As with his other breaches of fiduciary duty regarding the apartments, this abuse was not disclosed to the International Audit Committee or in International's proxy statements.

23. It was further part of the scheme that defendants and their co-schemers did misrepresent, con-

ceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts beyond those acts of concealment set forth above.

24. On or about March 27, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2001, which was filed by wire with the SEC;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT ELEVEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 23 of Count Ten of this Indictment as though fully set forth herein.

2. On or about April 4, 2002, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and

radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2002, which was filed by wire with the SEC;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT TWELVE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 23 of Count Ten of this Indictment as though fully set forth herein.

2. On or about December 22, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Toronto, Canada, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: a wire transfer of $2,150,000 from an account controlled by BLACK at Canadian Imperial Bank of Commerce ("CIBC") in Toronto to International's account at Bank One in Chicago, which was part of BLACK's payment for the Second Floor Apartment;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT THIRTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 and 2 of Count Five and paragraphs 1 through 18 of Count Eight of this Indictment as though fully set forth herein.

2. On or about December 22, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,

defendant herein, knowingly engaged and attempted to engage in a monetary transaction affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is, the wire transfer of $2,150,000 from an account controlled by BLACK at CIBC in Toronto to International's account at Bank One in Chicago, such property having been derived from a specified unlawful activity, namely the use of an interstate carrier for the purpose of executing and attempting to execute a scheme to defraud and to obtain money and property in connection with the CNHI II transaction in violation of Title 18, United States Code, Section 1341, and the use of a wire transmission in interstate and foreign commerce for the purpose of executing a scheme to defraud and to obtain money and property in connection with the CanWest transaction in violation of Title 18, United States Code, Section 1343;

In violation of Title 18, United States Code, Section 1957.

COUNT FOURTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. Inc. and Ravelston were Canadian corporations with their principal offices located at 10 Toronto Street, in Toronto, Canada ("the 10 Toronto Street offices"). BLACK, as Chief Executive Officer and Chairman of the Board of Directors of Inc. and Ravelston maintained his principal office at the 10 Toronto Street offices.

b. On or about November 18, 2003, the Staff of the Division of Enforcement of the United States Securities and Exchange Commission (the "SEC") advised counsel for BLACK in writing that the SEC was conducting an investigation regarding International. Additionally, on or about November 18, 2003, the SEC served counsel for BLACK with the first of several subpoenas for documents requesting:

> "Any and all documents relating to the payment of fees, including management and noncompete fees, from Hollinger to or for the benefit of any personnel of Hollinger or its affiliates, including, but not limited to, Conrad Black, David Radler, Mark Kipnis, Peter Atkinson, Jack Boultbee and to or for the benefit of any entities, including, but not limited to, Ravelston Corp., Horizon Publications, Inc. and Bradford."

c. On or about August 27, 2004, the SEC notified BLACK in writing that it intended to recommend a civil injunctive action against BLACK for violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934, Rules 10b-5 and 13b2-1 thereunder, and, as a control person of the Company, Sections 13(a) and 13(b) of the 1934 Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, relating to, among other things, "the transfer of Hollinger International, Inc. assets including, but not limited to, purported non-competition payments and sales of newspapers."

d. On or about October 13, 2004, pursuant to an application made by Catalyst Fund General Partner I Inc. ("Catalyst"), an Inspector was appointed for Inc. by the Superior Court of Justice in Ontario, Canada (the "Canadian court"), pursuant to the provisions of section 229 of the Canadian Business Corporations Act, R.S.C. 1985 c. C-44 (the "CBCA") to investigate the affairs of Inc. The Inspector was directed by the Canadian court to investigate several areas, including but not limited to, related party transactions between Inc. and related parties, and non-compete payments received by Inc. and Inc.'s Senior Management, including BLACK, Radler, Boultbee and Atkinson.

e. On or about December 17, 2004, the Canadian court ordered that:

> No documents of Inc. wherever situated or documents of Related Parties [including BLACK, Radler, Boultbee and Atkinson] which are pertinent to Inc. shall be destroyed without further Order of this Court. No documents currently resident at 10 Toronto Street shall be removed, altered or destroyed without the consent in writ-

ing of the Inspector or further Order of this Court.

f. On or about November 15, 2004, the SEC filed a Complaint for Permanent Injunction and Other Equitable Relief against CONRAD BLACK and others (the "SEC proceeding"). The SEC's Complaint alleged that BLACK engaged in a fraudulent and deceptive scheme to divert money from International "through a series of related-party transactions involving, among other things, purported 'non-compete payments . . . .'" An amended complaint was filed on March 10, 2005.

g. On or about March 21, 2005, the United States Attorney's Office for the Northern District of Illinois (the "government") filed a motion to intervene, for a limited, temporary stay of discovery in the SEC proceeding. In the motion, which was served on BLACK's counsel, the government declared:

> The United States Attorney's Office for the Northern District of Illinois [] is conducting a criminal investigation of Black, Radler, Hollinger, Inc. (collectively, 'the SEC defendants') and others relating to their conduct as to Hollinger International. The criminal investigation seeks to determine whether the SEC defendants and others fraudulently diverted corporate assets and opportunities owned by Hollinger International to themselves and to companies that they controlled. The transactions under investigation include various purported 'non-competition payments' that were made to Black, Radler, Hollinger, Inc. and others in connection with Hollinger International's sale of newspaper publications to third parties. The criminal investigation also seeks to determine whether fraud occurred in

connection with Hollinger International's sale of newspaper publications to companies controlled by Black and Radler, as well as other transactions between Hollinger International and the SEC defendants and their companies. In connection with each of these related party transactions, the criminal investigation seeks to determine whether the transaction was appropriately disclosed to Hollinger International's independent directors, in Hollinger International's SEC filings, and during Hollinger International's shareholder meetings.

The government further advised:

The government's criminal investigation seeks to determine whether the SEC defendants and others have violated various federal criminal statutes, including, but not limited to, Title 18, United States Code, Section 371 (conspiracy), 1341 (mail fraud), 1343 (wire fraud) and 2314 (interstate transportation of funds obtained by fraud), and Title 15, United States Code, Sections 77c(a), 77e(c), 77q(a), and 78j(b), and Title 17, Code of Federal Regulations, Section 240.10b-5 (securities fraud).

h. On or about April 20, 2005, the government's motion to intervene in the SEC Proceeding was granted.

i. As part of the SEC proceeding, on or about March 29, 2005, the SEC served its "First Request for Production of Documents" to Inc. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." The SEC's March 29, 2005 document request was served on counsel for BLACK, and others.

j. On or about May 19, 2005, Senior Trial Counsel for the SEC advised counsel for BLACK via telephone that the SEC would be serving a request for production of documents to BLACK shortly. The May 19, 2005 telephone call with BLACK'S counsel was followed by a letter sent later that day, via facsimile and Federal Express, to BLACK's counsel confirming that the SEC would be serving a request for production of documents to BLACK shortly.

k. As part of the SEC proceeding, on or about May 20, 2005, the SEC served its "First Request for Production of Documents" to BLACK. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." The SEC's May 20, 2005 document request was served on counsel for BLACK, and others.

l. On or about May 20, 2005, at approximately 2:08 p.m. E.S.T., an assistant to BLACK requested that security personnel at the 10 Toronto Street offices assist her in removing approximately 13 boxes to her vehicle in the rear parking area of the 10 Toronto Street offices. As the boxes were being moved by security personnel, a representative of Inc. advised the Inspector that BLACK was planning to remove boxes of documents from the 10 Toronto Street offices. Upon learning of BLACK's attempt to remove documents from the 10 Toronto Street offices, security personnel were advised by the Inspector of the December 17, 2004 Canadian court order regarding the removal of documents. Subsequently, all of the boxes were returned by security personnel to the inside of the 10 Toronto Street offices.

m. On or about May 20, 2005, at approximately 5:11 p.m. E.S.T., BLACK, his chauffeur and

his assistant returned to the 10 Toronto Street offices and loaded the approximately 13 boxes of documents (which BLACK had attempted to have removed earlier in the day) from inside the 10 Toronto Street offices through a rear entrance and into BLACK's vehicle. BLACK's vehicle was then driven away by his chauffeur with the boxes of documents inside.

3. On or about May 20, 2005, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,

defendant herein, corruptly concealed, and attempted to conceal, records, documents, and other objects with the intent to impair their availability for use in official proceedings, namely the SEC proceeding against BLACK, the criminal investigation of BLACK by a Federal grand jury and the pending criminal proceeding against BLACK before a judge and court of the United States;

In violation of Title 18, United States Code, Sections 1512(c)(1) and 2.

COUNT FIFTEEN

The UNITED STATES ATTORNEY further charges:

The Enterprise

1. Defendant CONRAD M. BLACK, F. David Radler, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis, Inc. and Ravelston constituted an association-in-fact enterprise (the "Hollinger Enterprise") within the meaning of Title 18, United States Code, Section 1961(4). The Bollinger Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of

achieving the objectives of the enterprise. The Hollinger Enterprise was engaged in, and its activities affected, interstate and foreign commerce.

2. Defendant CONRAD M. BLACK, as the controlling shareholder, Chief Executive Officer, and Chairman of the Board of Directors of International, Inc. and Ravelston, was the principal leader, manager and organizer of the Hollinger Enterprise. F. David Radler, who was the chief manager of International's United States newspapers, was involved in business decisionmaking relating to the purchases and sales of those newspapers. John A. Boultbee, who was a Chartered Accountant in Canada, functioned as BLACK's chief financial advisor, and was the architect of the Hollinger Enterprise's tax frauds. Peter Y. Atkinson, who was a licensed attorney in Canada, functioned as BLACK's chief legal advisor. Mark S. Kipnis, who was a licensed attorney in Illinois and was the secretary for the Board of Directors and Audit Committee of International, implemented the directives of BLACK and his associates.

Purposes of the Enterprise

3. The purposes of the Hollinger Enterprise included the following:

a. Enriching BLACK, his associates, and their entities at the expense of International and its public, majority shareholders through, among other things, mail fraud, wire fraud, and interstate transportation of money taken by fraud.

b. Depriving International and its public, majority shareholders of their right to receive honest services through, among other things, mail fraud and wire fraud.

c. Promoting and maintaining BLACK's control over the Hollinger Enterprise's affairs.

d. Enriching BLACK, his associates and their entities at the potential expense of the tax authorities of Canada through, among other things, mail and wire fraud.

e. Concealing the fraudulent activities of, and the fraud proceeds received by, BLACK, his associates and their entities.

Means and Methods

4. The means and methods by which BLACK and his associates conducted and participated in the conduct of the affairs of the Hollinger Enterprise included the following:

a. BLACK and his associates fraudulently deprived International of money and honest services by inserting themselves and their entities as non-competition covenantors and recipients of non-competition fees, without disclosing their misconduct to International's Audit Committee.

b. BLACK and his associates fraudulently deprived International of money and honest services by inserting themselves and their entities as non-competition covenantors and recipients of non-competition fees, and making false statements and material omissions about the payments to International's Audit Committee.

c. BLACK and his associates fraudulently labeled bonuses paid by International as non-competition fees in order to gain favorable tax treatment in Canada.

d. BLACK, with the assistance of Boultbee and other associates, fraudulently abused the per-

quisites that International had provided to BLACK – to the benefit of BLACK and the detriment of International – and failed to disclose BLACK's misconduct to International's Audit Committee, thereby depriving International of money and honest services.

e. BLACK and his associates concealed their fraudulent conduct by, among other things, causing International to make filings with the SEC that contained material falsehoods and omissions, by making false and fraudulent statements to International's shareholders and other outsiders.

f. The United States Attorney realleges and incorporates by reference the following paragraphs of this Indictment as though fully set forth herein: (a) paragraphs 1-33 of Count One; (b) paragraphs 1-18 of Count Eight; and (c) paragraphs 1-23 of Count Ten.

The Racketeering Violation

5. From in or about 1998 and continuing through in or about August 2002, at Chicago in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,

defendant herein, together with F. David Radler, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis, Inc., Ravelston and others known and unknown to the grand jury, being persons employed by and associated with the Hollinger Enterprise, an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, did conduct and participate, directly and indirectly, in the conduct of the affairs of Hollinger Enterprise through a pattern of racketeering activity set forth below.

The Pattern of Racketeering Activity

6. The pattern of racketeering activity, as defined in Title 18, United States Code, Section 1961(1) and 1961(5), consisted of the following acts:

Racketeering Act One: Interstate Transportation of Money Taken By Fraud

U.S. Community Sales – CNHI I

7. Defendant BLACK committed Racketeering Act One as follows: On or about February 1, 1999, in the State of New York, and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $12,000,000 relating to the CNHI I non-competition agreement that was transferred from CNHI to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

Racketeering Act Two: Interstate Transportation of Money Taken By Fraud

U.S. Community Sales – Horizon

8. Defendant BLACK committed Racketeering Act Two as follows: On or about August 9, 1999, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $1,200,000 relating to the Horizon non-competition agreement that was transferred from Horizon in Chicago, Illinois to Inc. in To-

ronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

Racketeering Act Three:
Interstate Transportation of Money
Taken By Fraud/Mail Fraud

U.S. Community Sales – Forum and Paxton

9. Defendant BLACK committed the following acts, any one of which constitutes Racketeering Act Three:

a. On or about September 30, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $100,000 relating to the Forum non-competition agreement that was transferred from Forum to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

b. On or about October 2, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $500,000 relating to the Paxton non-competition agreement that was transferred from Paxton to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

c. On or about April 9, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of

executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Kipnis, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained "non-competition payments" in the form of checks totaling $600,000, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Four:
Interstate Transportation of Money Taken By Fraud/Mail Fraud

U.S. Community Sales – CNHI II

10. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Four:

a. On or about November 1, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $750,000 relating to the CNHI II non-competition agreement that was transferred from CNHI to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

b. On or about November 21, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to

be deposited for delivery by an interstate carrier an envelope addressed to Mark S. Kipnis, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained a "non-competition" payment in the form of a check made payable to Radler in the amount of $4,300,000, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

c. On or about November 21, 2000, in the State of Illinois, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Peter Y. Atkinson, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained "non-competition" payments in the form of a check made payable to BLACK in the amount of $4,300,000, Boultbee in the amount of $450,000, and Atkinson in the amount of $450,000, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Five: Mail Fraud

U.S. Community Sales – American Publishing Company

11. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Five:

a. On or about February 8, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of

Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to Atkinson in Toronto, Canada, to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelope contained Noncompetition Agreements with American Publishing Company to be executed by certain International officers, and approximately $2.9 million in checks as consideration for those agreements, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

b. On or about March 1, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Kipnis, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained Non-Competition Agreements with American Publishing Company executed by certain International officers, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Six: Wire Fraud/Mail Fraud

Canadian Sales – CanWest

12. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Six:

a. On or about November 16, 2000, in the State of New York and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 18 of Count Eight of

this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from New York, New York, to Toronto, Canada, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a memorandum regarding the distribution of the CanWest non-competition consideration, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

b. On or about May 1, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 18 of Count Eight of this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from Chicago, Illinois, to London, England, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a letter and the May memorandum, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

c. On or about May 4, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 18 of Count Eight of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, envelopes addressed to members of the International Audit Committee in New York and Washington, D.C., to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelopes contained a memorandum relating to the non-competition payments in the CanWest transaction, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Seven: Wire Fraud

Perquisites

13. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Seven:

a. On or about December 22, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from Toronto, Canada, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: a wire transfer of $2,150,000 from an account controlled by BLACK at CIBC in Toronto to International's account at Bank One in Chicago, in connection with BLACK's purchase of the Second Floor Apartment, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

b. On or about March 27, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2001, which was filed by wire with the SEC, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

c. On or about April 4, 2002, at Chicago, in the Northern District of Illinois, Eastern Division,

and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2002, which was filed by wire with the SEC, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

All in violation of Title 18, United States Code, Section 1962(c).

COUNT SIXTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. International was required to pay federal corporate income taxes in the United States.

b. International retained a tax preparer to prepare federal corporate tax returns (Form 1120), to report receipts, expenses and total income for International.

c. Defendants, as executives of International and agents of Ravelston, were responsible for maintaining accurate books and records.

d. Throughout 1999, defendants received various sums of cash from transactions, in the aggregate amount of approximately $13 Million, and,

caused those amounts to be deposited into accounts other than accounts controlled by International. Defendants' actions caused International to not correctly report the noncompete payments in 1999.

e. Defendants caused the tax preparer to prepare a false income tax return that failed to include the diverted cash receipts.

2. On or about September 15, 2000, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE
PETER Y. ATKINSON, and
MARK S. KIPNIS

defendants herein, willfully procured and assisted in the preparation of a false and fraudulent United States Corporation Income Tax Return (Form 1120) and accompanying Schedules, on behalf of International, for the calendar year 1999.

3. Defendants did not believe that the 1999 federal corporate income tax return was true and correct as to every material matter, in that it was stated in that return, line 11, that the total income of International was approximately $394 Million when, in fact, as defendants well knew, total income materially exceeded that amount and included gross receipts of approximately $13 Million, which was not reported on the corporate return;

In violation of Title 26, United States Code, Section 7206(2).

COUNT SEVENTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. International was required to pay federal corporate income taxes in the United States.

b. International retained a tax preparer to prepare federal corporate tax returns (Form 1120), to report receipts, expenses and total income for International.

c. Defendants, as executives of International and agents of Ravelston, were responsible for maintaining accurate books and records.

d. Throughout 2000 defendants received various sums of cash from transactions, in the aggregate amount of approximately $16 Million, and, caused those to be deposited into accounts other than accounts controlled by International. Defendants' actions caused International to not correctly report the noncompete payments in 2000.

e. Defendants caused the tax preparer to prepare a false income tax return that failed to include the diverted cash receipts.

2. On or about October 26, 2001, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE

PETER Y. ATKINSON, and
MARK S. KIPNIS

defendants herein, willfully procured and assisted in the preparation of a false and fraudulent United States Corporation Income Tax Return (Form 1120) and accompanying Schedules, on behalf of International, for the calendar year 1999.

3. Defendants did not believe that the 2000 federal corporate income tax return was true and correct as to every material matter, in that it was stated in that return, line 11, that the total income of International was approximately $383 Million when, in fact, as defendants well knew, total income materially exceeded that amount and included gross receipts of at least $16 Million, which was not reported on the corporate return;

In violation of Title 26, United States Code, Section 7206(2).

FORFEITURE ALLEGATION ONE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts One through Seven of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Counts One through Seven.

2. Beginning no later than in or about January 1999, and continuing thereafter until in or about May 2001, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, did engage in violations of Title 18, United States Code, Sections 1341 and 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, namely $32,000,000, including but not limited to:

a. $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005;

b. BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of which are pledged to secure BLACK's bond in this case;

c. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

d. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(c), and Title 21, United States Code, Section 853(p), if any of the property described above

as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property, including but not limited to the following:

a. ATKINSON's residence at 3101 Redwood Road, Napa, California, which is pledged to secure ATKINSON's bond in this case.

FORFEITURE ALLEGATION TWO

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts Eight and Nine of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Counts Eight and Nine.

2. Beginning no later than in or about May 2000, and continuing thereafter until in or about

May 2002, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, did engage in violations of Title 18, United States Code, Sections 1341 and 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, namely $52,800,000, including but not limited to:

a. $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005;

b. BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of which are pledged to secure BLACK's bond in this case;

c. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

d. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(c), and Title 21, United States Code, Section 853(p), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property, including but not limited to the following:

a. ATKINSON's residence at 3101 Redwood Road, Napa, California, which is pledged to secure ATKINSON's bond in this case.

FORFEITURE ALLEGATION THREE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts Ten through Twelve of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in

connection with a conviction on Counts Ten through Twelve.

2. Beginning no later than in or about May 1998, and continuing thereafter until in or about August 2002, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, did engage in violations of Title 18, United States Code, Section 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, including but not limited to:

a. At least $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005, which is pledged to secure BLACK's bond in this case;

b. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

c. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(e), and Title 21, United States Code,

Section 853(p), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property.

FORFEITURE ALLEGATION FOUR

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Count Fifteen of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Count Fifteen.

2. Beginning no later than in or about May 1998, and continuing thereafter until in or about August 2002, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,

defendant herein, did engage in a violation of Title 18, United States Code, Section 1962, thereby sub-

jecting to forfeiture to the United States certain property pursuant to Title 18, United States Code, Section 1963.

3. Defendant BLACK:

a. has acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1);

b. has interests in, securities of, claims against, and property and contractual rights which afford a source of influence over, the enterprise named and described herein which the defendant established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, which interests, securities, claims, and rights are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2);

c. has property constituting and derived from proceeds obtained, directly and indirectly, from racketeering activity, in violation of Title 18, United States Code, Section 1962, which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3).

4. The interests of defendant BLACK subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2) are:

a. All of his right, title and interest in stock and all other ownership interests in Conrad Black Capital Corporation, Ravelston and Inc.

5. The interests of defendant BLACK subject to forfeiture to the United States pursuant to Title 18,

United States Code, Sections 1963(a)(1) and 1963(a)(3) are:

a. at least $92,000,000, including but not limited to:

1. the $8,558,035 that represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005, and BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of which are pledged to secure BLACK's bond in this case;

2. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

3. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

6. Pursuant to Title 18, United States Code, Section 1963(m), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;

- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendant up to the value of the above forfeitable property.

/s/ Patrick Fitzgerald
UNITED STATES ATTORNEY

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, et al.,	)	Chicago, Illinois
	)	March 12, 2007
Defendants.	)	10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS –
JURY INSTRUCTION CONFERENCE
BEFORE THE HONORABLE AMY J. ST. EVE

* * *

[Colloquy on Mail Fraud Instructions]

[Page 65]

* * *

MR. YUROWITZ: Your Honor, just one thing.

Maybe we could inquire – the Court could inquire – of the government, what it is that the honest services, other than confusion, is really adding in this case and why is it necessary?

At bottom, what's at issue here is money. The government has said it. They're going to ask the jury – "This is what's taken." And just – we're unsure

ourselves, what is it that – it's certainly adding a lot of confusion, all the issues Mr. Martin raised.

Why do we need it in this case? I'm sure your Honor has discretion. I know it's charged in the indictment. But I don't know that it's necessary.

THE COURT: Well, the government is certainly free to charge things how they would like to.

Mr. Sussman?

[Page 66]

MR. SUSSMAN: And, obviously, I mean, as we'll make very clear to this jury, it's about more than money. This case is about trust. And this case is about trust that was put to directors and officers of a publicly-traded company not just by its Board of Directors and its Audit Committee, but by the shareholders. And it's the government's theory that in addition to taking money that didn't belong to these individuals – to the company, as well as the shareholders – what these men did was violate the trust that was put in them.

So, the government will argue both theories, and the government believes that both theories are equally important.

MR. YUROWITZ: Your Honor –

THE COURT: I am sure we will hear – I am not going to revisit this issue. This was addressed in the motions to dismiss. I am sure we will hear more on this in opening statements. I have heard enough now. It stands.

* * *

[Page 88]

* * *

THE COURT: Okay.

34.

MR. YUROWITZ: We would certainly strongly object to Government's 34. Once again, I think Walters directly supports it. They say a deprivation is a necessary element. And we propose a counterproposal which, we think, adequately states the law.

MR. SISKEL: Judge, my understanding –

THE COURT: I thought Fernandez – while this might be an accurate statement of the law, I thought Fernandez – rejected the argument that the jury instructions should have included something along these lines.

MR. SISKEL: Well, let me just say, Judge, my understanding was that I thought the defendants agreed this **[Page 89]** was an accurate statement of the law, that we don't have to show foreseeable harm. There is authority in other circuits to the contrary.

We are willing to withdraw this instruction, assuming that defendants' proposed instruction is not given; and, that, you know, we reserve the right, if there is argument to suggest that foreseeability is an element, to instruct the jury appropriately that it isn't.

THE COURT: I will allow you to withdraw this instruction.

Although I do think it is an accurate statement of the law, I think Fernandez, as I said a moment ago –

and Hausmann subsequent to that – reject that it should be an instruction.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	March 20, 2007
Defendants.	)	8:15 o'clock a.m.

VOLUME FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Government Opening Argument]

[Page 840]

Keep remembering this was the shareholders' money when they sold this business to the public. It's the woman who put Hollinger International stock into her retirement account. That's who owns this company. It's the guy who bought Hollinger Interna-

tional stock and put it into the college fund. That's who owns this company. It's not their company.

MR. GENSON: Objection.

Objection, your Honor, to those characterizations.

THE COURT: Overruled.

You may continue.

BY MR. CRAMER:

It's not their company. It belongs to the shareholders.

And you will see, ladies and gentlemen, that they just take a little piece. They just take the tiniest pieces.

But these are hundreds of millions of dollars in deals. One of these deals was several billion dollars.

I will tell you, what. If you take a little piece from deals that are worth hundreds of millions of dollars and billions of dollars, you can get to 60 million pretty darn quick. And that's what they did.

What's wrong with it? Why can't you take $60 million from a public company that you work for?

Ladies and gentlemen, besides the obvious that it's **[Page 841]** stealing, these defendants also had a duty. They had an obligation to the shareholders. You'll hear it called a fiduciary duty.

What a fiduciary duty is, is directors and officers have a duty to Hollinger International and its shareholders.

Generally, they must consider the company's and shareholders' best interests. They must not harm the company or its shareholders.

So, they have this duty to the shareholders. And it's a thread. It's a thread that's going to go through this trial – a fiduciary duty.

And you will see them, ladies and gentlemen, breach that duty time after time after time. The shareholders have a right to expect that the officers – these defendants – don't lie to them. They have a right to expect that they are honest with them. At the very least, they can expect not to be lied to – at the very least.

This duty is not just a day-to-day duty. There's also something that comes into play when a company sells an asset.

Let's say a company sells an asset, like a newspaper, and the officers can benefit from it. All right?

Now you have got a conflict. You have the officers who have a fiduciary duty, but they can benefit from a transaction. That's a conflict.

[Page 842]

You'll hear, ladies and gentlemen, that's called a related-party transaction. A related-party transaction is when a director or officer has a fiduciary duty even when he or she has a personal interest that conflicts with the shareholders' interests.

There's this conflict, right? They've got a fiduciary duty, but they can benefit from a transaction.

And when that happens, it's called a related-party transaction.

And you're going to hear, ladies and gentlemen, that companies – all companies – have a process to deal with this conflict. Someone's got to look out for

the shareholder because it can't be the officers. They can get some money from the transaction.

And Hollinger International, it's the Audit Committee. It's the Audit Committee. It's the subcommittee of the Board of Directors that is set up to review these; to make sure that the shareholders are given a fair shake; to make sure someone's looking at these transactions; to make sure the shareholders' interests are taken into account and that there's fair dealing.

And you will see that the Audit Committee is made up of what's called independent directors. And you're going to hear that phrase "independent directors." It, basically, means they're not employees of the company.

[Page 843]

The Board of Directors of International, like the Board of Directors of most companies, have other jobs. They have other responsibilities. At International they got together about four or five times a year to deal with big-picture items. But they relied upon the officers to give them the information.

And the Audit Committee's job is to protect shareholders when the officers or directors have that conflict. They have a fiduciary duty, but there's a conflict. So, the Audit Committee will step in. And they make sure that these related-party transactions are fair for all the shareholders.

Let's look at a Board. Here's (indicating) the process that was set up at International.

I think everyone can see this.

All right. We've got a related-party transaction. You need to give full and accurate disclosure to the

Audit Committee, which will then recommend it to the Board for approval.

So, let's step back for a second. Here's where we are (indicating).

These defendants have a fiduciary duty to protect the shareholders. When they can get money from a transaction, you've got this conflict – this related-party transaction.

Boom, the Audit Committee steps in.

[Page 844]

Full and accurate disclosure is given to the Audit Committee, to the Board of Directors for approval.

And here's the rub (indicating). Here's how they did it (indicating).

Focus on this box (indicating), ladies and gentlemen: "Full and accurate disclosure." Because just like those charts I showed you from Joe's Tavern and the other ones, the defendants are the ones that need to give full and accurate disclosure to the Audit Committee. They didn't. Not once. Not once. Not in any of the deals that you're going to see. Not once did they give full and accurate disclosure.

All right. Keep this (indicating) in mind. Let's dial back to see how they did it.

They go to the buyer. And this (indicating) is the one where they insert the individuals: Black, Radler, Boultbee and Atkinson. They go to the buyer and say, "I know you want International to sign a Non-Competition Agreement. That makes sense. International is selling the newspapers. We're going to give you are ourselves, too."

The buyer says, "Fine."

The price doesn't change.

Now, they've got to go back to the Board of Directors, right? They lied. They give false and incomplete information; and, just like that, they get some money in their pocket.

[Page 845]

And this right here (indicating) is this (indicating). Where they go back to the Board, that's this process (indicating).

And the Audit Committee is relying upon these officers. I told you the Audit Committee trusted these officers.

If the Audit Committee doesn't have the information they need, the shareholders are not protected. And that's where they did it. That was the gap in the system that they exploited.

The Audit Committee – remember the Board of Directors doesn't go back to the buyers. These are hundreds and hundreds of newspapers. They're not going to go back to the buyers. They trust these defendants. And that's how they got away with it so easily.

* * *

[Page 849]

* * *

And the best part – truly the best part – is that if you're a Canadian citizen – and Black, Radler, Boultbee and Atkinson are – and you can get non-competition money, it's tax-free. It's tax-free.

So, not only do they take $60 million from the public shareholders, they didn't pay any taxes on it. That was just a little added benefit. Because you'll

hear, ladies and gentlemen, that in Canada you don't have to pay taxes on that. So, you want to get the money out and up; and, if you can call it a "Non-Competition Agreement" versus a "bonus" or "compensation" or "salary" or whatever it is, it's tax-free in hand. And you'll hear that during the course of the trial.

* * *

[Page 866]

* * *

You're going to learn, ladies and gentlemen, that one way the shareholders learned about what's going on in their company, is what's called SEC disclosures. Companies have to make disclosures to the Securities and Exchange Commission.

And all that is, is it lets the shareholders know what's going on in their company.

The company can buy McDonald's stock, you are not at McDonald's headquarters every day.

[Page 867]

How do you learn what's going on? These disclosures (indicating). And the disclosures will tell the shareholders what's happening.

"What were the big transactions in your company?"

"How much money did your company make?"

"What were the related-party transactions in your company?"

"What's going on in your company?"

And you will hear, ladies and gentlemen, that the officers – the defendants – gave false disclosures

on the non-competes and false disclosures on other things along the way.

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	March 27, 2007
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Lloyd Case]

[Page 2319]

* * *

Q. Mr. Case, when you embarked on the negotiation to buy the Jamestown Sun from Hollinger International, did you request a Non-Compete Agreement as part of that transaction?

A. No.

Q. Why not?

A. We just didn't think it was an issue. There was – in our mind, it didn't – we weren't concerned that Hollinger would come back into Jamestown, North Dakota, and start another business.

I also understood that they were liquidating a lot of their newspapers and probably not interested in expanding their operation.

[Page 2320]

MS. RUDER: If we could put back up Government Exhibit Forum 9-A, the map we were looking at before.

BY MS. RUDER:

Q. Mr. Case, at the time you were negotiating the transaction – focusing on Stutsman County, in particular – did you have any concerns about Hollinger International coming back into that community and competing with Forum if you bought the Sun?

A. No, I did not.

Q. And is that for the reasons that you've just described to the jury?

A. Yes.

Q. Now, when Forum bought the Jamestown Sun, from what company did you buy it?

A. Hollinger International.

Q. As of the year 2000, were you familiar with a Canadian company called Hollinger, Inc.?

A. No.

Q. Did you know what relationship there was, if any, between Hollinger International on one side and the Canadian company Hollinger, Inc., on the other?

A. No, I did not.

Q. Did you have any concerns about the Canadian company Hollinger, Inc., going back into Stutsman County and competing with you?

[Page 2321]

A. No.

Q. In your discussions with Hollinger and its representatives, did you ever request that any Hollinger company or person sign any Non-Compete Agreement with Forum Communications?

A. No, I did not.

Q. And, in particular, Mr. Case, let me ask you specifically, did you ever request that the Canadian company Hollinger, Inc., sign a non-compete with Forum?

A. No.

Q. Was that something that was important to you?

A. No.

Q. Did you care?

A. No.

* * *

[Page 2334]

* * *

Q. We talked about the purchase price for this deal being $14 million; is that correct?

A. Yes.

Q. Did Forum Communications Company pay any more money to Hollinger International in exchange for its agreement not to compete in these counties?

A. No, we did not.

Q. Did Forum pay any more money for the agreement of the Canadian company Hollinger, Inc., not to compete in these counties?

A. We did not.

Q. Would you have even considered paying money for that agreement not to compete?

A. No.

Q. Why not?

A. Once again, it was not a threat. It was not a threat to us. We already made the $14 million offer. It was accepted. There was no need to pay any more money. And we didn't – we **[Page 2335]** didn't – require a non-compete.

Q. Mr. Case, if you didn't want a non-compete from Hollinger International or Hollinger, Inc., why did you agree to go ahead and sign a contract that had them in as parties?

A. If anyone volunteers a non-compete, it would be silly not to take it. I mean, we didn't – we didn't – require it, didn't think we needed it; but, if somebody offers it, I'd take it. I'd take it – if there were 12 of them, I'd take them. It doesn't – doesn't – matter.

Q. Would you have done the deal, anyway?

A. Yes.

Q. Would you have closed the deal, anyway?

A. Yes.

Q. Was doing this deal for you conditioned on anyone signing a non-compete with Forum Communications?

A. No.

* * *

[Page 2339]

* * *

Q. Did you enter into non-compete agreements with any of those four men as part of this deal?

A. No.

Q. Did you request non-competes from them?

A. No.

Q. Did you care about non-competes from them?

A. I did not care.

Q. At any point in your negotiations with Hollinger International, did you request that money from the deal go to Mr. Black, Mr. Radler, Mr. Boultbee or Mr. Atkinson?

MR. SCHACHTER: Objection.

BY THE WITNESS:

A. No.

MR. SCHACHTER: Relevancy.

THE COURT: Overruled.

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois March 27, 2007
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of David Paxton]

[Page 2419]

Q. How did Hollinger, Inc. get into this agreement?

A. It was proposed by Hollinger that the Non-Competition Agreement, both the amount of the Non-Competition Agreement and the allocation to Hollinger and to Hollinger, Inc. and, in fact, the in-

clusion of Hollinger, Inc. was all suggested by Hollinger.

Q. So the inclusion of Inc. was suggested by Hollinger, and you said the allocation amount also was?

MR. GENSON: Objection, leading. He's repeating the answer as part of the new question. I object to that.

THE COURT: Objection to leading is sustained. He can certainly use part of the answer as a transition into the next question.

BY MR. CRAMER:

Q. You said the allocation was also suggested by International. What are you talking about, the allocation?

A. The allocation of 75 percent of the $2 million non-compete to Hollinger and 25 to Inc., and, in fact, the fact that 2 million of the 59 million was being allocated, all of that was proposed by Hollinger.

Q. You already told us you didn't negotiate the $2 million. Did you negotiate at all the percentage split between International and Inc.?

A. No, we did not.

Q. Why not?

[Page 2420]

A. It did not matter to us. It did not affect us.

Q. Why didn't it matter?

A. We were going to pay $59 million whether this was two million or two-and-a-half or one-and-a-half. So it did not affect our total cost.

The amount that was allocated to the non-compete agreement did not have a tax impact or other impact on us, so it did not matter to us.

Q. Would you have paid $59 if Inc. was not in that section?

A. Would we have paid $59 million?

Q. If Inc. was not in that section?

A. Yes, we would have.

* * *

[Page 2434]

* * *

Q. At the time of the closing – actually, let me back up for a minute.

The day before the closing, you talked before that you knew who Conrad Black was. The day before the closing, did you request that Conrad Black be included in the Non-Competition Agreement?

A. No, I did not.

* * *

[Page 2435]

BY MR. CRAMER:

Q. Why didn't you ask for Mr. Black in the Non-Competition **[Page 2436]** Agreement?

A. We did not feel that we needed a Non-Competition Agreement with Conrad Black.

* * *

BY MR. CRAMER:

Q. I'll ask it again. Did you request – the day before the closing, did you request that Jack Boultbee be included in the Non-Competition Agreement?

A. No, I did not.

Q. Why not?

MR. NEWMAN: Objection, Judge.

[Page 2437]

MR. CRAMER: I'll stand – I'm not sure what the basis is, but if it's relevance –

THE COURT: What's your basis?

MR. NEWMAN: Relevancy.

MR. CRAMER: If it's relevancy, I'll stand on my prior answer.

THE COURT: Objection overruled. You may answer.

BY MR. CRAMER:

Q. Why didn't you request the day before the closing that Jack Boultbee be included in the Non-Competition Agreement?

A. We did not believe we needed a Non-Competition Agreement with Jack Boultbee.

Q. The day before the closing, did you request that Peter Atkinson be included in the Non-Competition Agreement?

MR. HOCHMAN: Objection, your Honor, foundation.

MR. CRAMER: Foundation? Foundation?

MR. HOCHMAN: He hasn't stated he even knows who Peter Atkinson is, your Honor.

THE COURT: Objection overruled. You may answer.

BY THE WITNESS:

A. We did not.

BY MR. CRAMER:

Q. Why not?

A. We didn't feel we needed it.

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS	)	
Defendants.	)	Chicago, Illinois April 10, 2007 9:00 o'clock a.m.

VOLUME SIXTEEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Colloquy Regarding Curative Instruction]

[Page 3815]

* * *

THE COURT: I will tinker with your proposed curative instruction and certainly consider giving something along the lines that I suggest.

I think you go too far in what you have proposed.

And, certainly, the instructions at the end of the case will make clear what these defendants are charged with.

So, let me tinker with it and I will come up with something.

MR. SUSSMAN: Your Honor, I really disagree with what is being said –

THE COURT: I know you do.

MR. SUSSMAN: – in terms of – I know you know.

(Laughter.)

MR. SUSSMAN: – in terms of – I think, first of all, there's an honest services – there are honest services provisions –

THE COURT: Right.

MR. SUSSMAN: – in this case. And they are defrauding – every time that they file and the lawyers rely on it, the Audit Committee relies on it, other shareholders rely on it – every time that they file a false disclosure – every time there is an annual meeting and there is a false **[Page 3816]** disclosure – filed before an annual meeting, and the shareholders are going off of inaccurate information, not only is it concealment of the fraud and continuation of the fraud, it is a violation of those duties and those honest services.

So, we're not just talking about just the theft of money. We are talking about a violation of honest services, which continues throughout this and is not related to specific instances.

THE COURT: All right. Let me tinker with the language.

* * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK KIPNIS Defendants.	Docket No. 05 CR 727 Chicago, Illinois April 25, 2007 9:00 o'clock a.m.

VOLUME TWENTY-SIX
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Richard Burt]

[Page 5587]

* * *

Q. Sir, I'd like to direct your attention for a moment to a disclosure in April of 2002. We talked before – I believe, yesterday – about how you would go about reviewing disclosures.

Do you recall approving a 10-K disclosure in April of 2002?

A. I think I do, yes.

Q. Is that part of your –

A. Yes.

Q. – responsibilities as an Audit Committee member?

A. 10-K is an annual filing, and the Audit Committee would approve those annual filings.

MR. CRAMER: Can I publish Filing 9-F?

THE COURT: You may.

BY MR. CRAMER:

Q. And this is 9-F in your binder. And I believe I tabbed the page, or you could just go off the screen.

A. Okay.

Q. It's a 10-K from April of 2002.

And did you sign this 10-K sir?

[Page 5588]

A. Yes.

Q. And I'd like to direct your attention to some language.

This disclosure says, "During 2000, the company sold most of its remaining U.S. Community newspaper properties including 11 paid dailies, three paid non-dailies and 31 free distribution publications for total proceeds of approximately 215 million. Pre-tax gains total 91,200,000 were recognized on these sales in 2000.

"In connection with the sales of U.S. newspaper properties in 2000, to satisfy a closing condition, the company, Lord Black and three senior executives entered into Non-Competition Agreements with the purchasers pursuant to which each agreed not to compete, directly or indirectly, in the United States."

Do you see that language?

A. I do see it, yes.

Q. And as it does down, it lists the amount of money in 2001 and 2000; is that right?

A. Yes, it does.

Q. The last line is what I'd like to draw your attention to now, sir: "The company's independent directors have approved the terms of these payments."

Do you see that?

A. I do.

Q. Is that an accurate statement, Mr. Burt?

[Page 5589]

A. No, it is not.

Q. Why did you sign this disclosure, sir?

A. I signed the disclosure because I missed this – this – paragraph.

Q. I'd like to direct your attention now –

MR. CRAMER: If I may publish Filing 9-G, Judge?

THE COURT: You may

MR. CRAMER: Thank you.

BY MR. CRAMER:

Q. And this is – 9-G is a proxy statement. Tell us very briefly, what is your understanding of a proxy statement?

A. Proxy statements are issued on an annual basis to go to the shareholders. The shareholders – and the proxy statements describe in overall terms how the company is doing.

It then tells the shareholders who is being nominated to serve on the Board for the coming year. And it provides information about the backgrounds of the Board members, as well as information about their shareholdings – in the case of management, their salaries – so that the shareholders can then vote for the – for the – slate of Directors of the company.

Q. I'd like to direct your attention to the proxy which was filed March, 2002, and specific language – which is, going to your binder, the bottom of the page, it would be Page 19.

Do you have it? You can look on the screen.

[Page 5590]

It says, "In connection with the sales of U.S. – United States newspaper properties in 2000, to satisfy a closing condition, Hollinger, Inc., the company, Lord Black and Messrs. Radler, Atkinson and Boultbee entered into Non-Competition Agreements with the purchasers pursuant to which each agreed not to compete, directly or indirectly, in the United States with the United States businesses sold to the purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 and 2000 of $15.6 million, consisting of 7,197,500

paid to Lord Black," the same amount paid to Mr. Radler and, then, 602,500 paid to Mr. Atkinson and paid to Mr. Boultbee.

Is that what it says?

A. Yes, it does.

Q. Sir, when you – did you review this disclosure?

A. I did.

Q. I mean, this proxy.

A. I did.

Q. Did you notice that language when you reviewed it?

A. I didn't notice that language. And, typically, when you do review these – these –

MR. NEWMAN: Objection, if your Honor pleases.

THE COURT: Sustained.

MR. NEWMAN: The question was asked and answered.

BY MR. CRAMER:

[Page 5591]

Q. Without saying – first, here's the question: Did you review this –

A. Yes.

Q. – proxy?

A. Yes.

Q. Why didn't you pick up on that language?

MR. NEWMAN: Objection.

MR. ROMANO: Objection.

THE COURT: What is your objection?

MR. ROMANO: Why is irrelevant, your Honor.

MR. CRAMER: Why is relevant, Judge.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Well, when you go through these filings – and they're sometimes lengthy, and I'm not a lawyer – you heavily rely on management to point out the salient issues in each of these filings.

Each filing every year or every quarter are very similar in format. They con- – they contain similar kind of legal boilerplate, if I can use that expression. And it's hard for a Director to go through these documents without the help or assistance of management pointing out issues like these.

BY MR. CRAMER:

[Page 5592]

Q. At any point, on the two disclosure we just looked at, did anyone from management point out anything about the non-competition payments going to the individuals?

A. No.

* * *

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK KIPNIS	)	Chicago, Illinois
Defendants.	)	April 27, 2007 8:45 o'clock a.m.

VOLUME TWENTY-EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Marie-Josée Kravis]

[Page 6123]

* * *

Q. As to – excuse me just a moment.

I'd like to turn in your binder to Government Exhibit Filing 9F, and look for a moment at Hollinger International's 10-K which covered the year 2001.

THE COURT: You may publish.

MS. RUDER: Thank you, Judge.

BY MS. RUDER:

Q. And I want to focus with you in particular in the notes to financial statements on acquisitions and depositions section, which starts at filing page – what's that – 6743, Ms. Kravis. Just let us know when you're there.

Are you at that section?

A. I'm not, but I'll go on the screen.

Q. Okay. Let me – I want to make sure you have the document in front of you.

If you look in the bottom right-hand corner – Ed, would you mind rolling that up so Ms. Kravis can see? It's USA 006743. It shows up on your screen, if you're looking at the bottom right-hand corner.

[Page 6124]

A. Yes.

Q. Okay, thanks.

Let's look back at the top. We're looking in the notes to the financial statements at acquisitions and dispositions, is that correct?

A. Yes.

Q. And in subsection (a), is there a description of UniMedia sale? See where –

A. Yes, I was just reading it, yes.

Q. Okay. And what transaction does subsection (b) cover? What's the name of that transaction?

A. It's called Osprey.

Q. And in your role as an Audit Committee member – as an Audit Committee member, Ms. Kravis, were you generally familiar with the Osprey transaction in 2001?

A. I was.

Q. Were non-compete payments made in that transaction?

A. They were.

Q. And were those payments that you were aware of as an Audit Committee member?

A. Yes.

Q. Is the Osprey transaction described in subparagraph (b)?

A. It is.

Q. If we turn to the next page of the 10-K up at the top, is there a description of non-compete payments in Osprey?

[Page 6125]

A. Yes.

Q. And the last sentence of that paragraph states, "Such consideration was paid to Lord Black and the three senior executives and has been approved by the company's independent directors." Do you see that?

A. Yes.

Q. Is that accurate?

A. Yes.

Q. You had approved Osprey?

A. Yes.

Q. If we continue down the page, what transaction does the next paragraph cover?

A. The CanWest transaction.

Q. And as you've described, were you familiar with the CanWest deal?

A. I was.

Q. Does this 10-K describe non-compete payments to executives in connection with CanWest?

Look on the next page, in that top paragraph about halfway down where it says, "Also, as required by CanWest?

A. Yes.

Q. And does the last sentence of that paragraph say, "The company's independent directors have approved the terms of these payments"?

A. It does.

[Page 6126]

Q. And in terms of approving non-compete payments to CanWest, was that accurate?

A. Yes.

Q. The language there says that "As required by CanWest as a condition to the transaction, Lord Black and three senior executives entered into the non-compete agreements."

Did you believe that to be true?

A. I did.

Q. Now, if we look down further on the page, there's some other subsections.

MS. RUDER: No, I want to see all of them. Thank you.

BY MS. RUDER:

Q. You see there's a subsection (3) about promissory notes, is that correct?

A. Yes.

Q. And then subsection (f) says, "During 2000, the company sold most of its remaining U.S. community newspaper properties." Do you see that?

A. Yes.

Q. The very last sentence of that states, "The company's independent directors have approved the terms of these payments?

With respect to U.S. community newspaper sale, Ms. Kravis, is that accurate?

[Page 6127]

A. No, it isn't.

Q. Why isn't it accurate?

A. Because we had not approved those non-competes.

Q. Now, did you sign this 10-K for the year 2001?

A. I did.

Q. And did you have an opportunity to review this in 2002 before it was filed?

A. I did.

Q. Do you recall which, if any, of the paragraphs you had focused on that point in time?

MR. NEWMAN: Objection to the form of the question. It's leading.

THE COURT: Sustained.

BY MS. RUDER:

Q. Do you recall which paragraphs you focused on at the time?

A. I don't.

Q. And in terms of this particular paragraph, Ms. Kravis, why is it that you signed the 10-K if this is not accurate?

MR. NEWMAN: Objection.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. I – I must have missed it.

BY MS. RUDER:

Q. Now, I'd like to turn – and – okay.

* * *

[Cross-Examination of Marie-Josée Kravis]

[Page 6175]

BY MR. TUITE:

Q. Do you see that? The last line they're talking about that, they're talking about the non-competes, and at the last line, "The independent directors have approved the terms of these payments." Do you see that?

A. I do.

Q. And you saw that when you read the 10-K, and that was true, that CanWest had been approved.

A. That was true.

Q. And you had seen that within the document when you read it.

A. I think so.

Q. Okay. But on the next page paragraph (g) on disclosure page 105, included in the disposition described in note 1(f), they were talking about the sale to – talking about paragraph, page 105.

Working off the wrong document here.

[Page 6176]

They talk about that the independent directors approved those transactions with respect to U.S. sales.

Do you see that, in connection with the U.S. newspaper sales?

A. Paragraph (f), you mean.

Q. Right. (F), you see that? The last sentence they're talking about that, and the executives got 15,600,000, if you combine the two numbers, 600,000 in 2001 and 15 million in 2000. Do you see that?

A. That's correct.

Q. And you see that line that says, "The company's independent contractors have approved the term of these payments." Right?

A. I see that.

Q. And you're saying that was wrong.

A. I am.

Q. Tell this jury how it was that you were able to read the first page that said – that had the correct

statements and you read that but the next page you didn't read.

A. May I surmise?

Q. Yeah.

A. I think that it could be that I focused on the recent transactions, which were Osprey and CanWest, and I focused more attention on a description of transactions that had recently taken place and not a transaction or transactions **[Page 6177]** that had taken place a year or 15 months before. It's my – I can only surmise.

Q. Only can surmise, but would you agree that it as just the next page after two things you did read and noticed that it was correctly stated, but on the next page, where you say it was incorrectly stated, you don't see that.

A. I can only surmise that I was focusing attention on recent transactions.

Q. Okay.

A. And I missed something that had taken place, you know, 15 months before.

Q. Well, CanWest was in 2000, wasn't it?

A. Well, in 2001 was the May memo, the meeting where we reviewed that transaction. I had that in my mind.

Q. Okay. That was 2001. And isn't this referring to 2000 and 2001 in the paragraph that you say you missed?

A. Well, the paragraph begins with 2000. I think it refers to – mostly to transactions that occurred in 2000.

And as I say, I missed it. I'm surmising now which – I'm trying to give you an explanation, but I don't know.

Q. Okay. Now, I – I don't know your reading habits, but let me ask you if your reading habits are similar to most of ours. Do you – when you get a document like this, do you usually read it front to back? Start from the beginning and read to **[Page 6178]** the back?

A. Not necessarily.

Q. Okay. You just go to certain parts?

A. No, but I may read some parts one day and read other parts later. I don't – a document of this size and with this level of detail, I would doubt I would read from front to cover in one sitting.

Q. No, I didn't mean one sitting. I'm sorry. It's, again, a misunderstanding.

When you do read it, do start from the beginning and read as much as your eyes and brain can take and maybe put it down and then continue from where you left off? Would that be correct to say?

A. That's generally the practice.

Q. Okay. And those pages that you read and you saw the approvals were there and you agreed it was right were way in the back. I mentioned it's pages 104 and 105. They're – I supposed at some point your eyes start to glaze over reading this.

Did you note earlier in that document, particularly page 65, and we'll show it to you on the screen, if you would, page 65 which I'll show you, where it says table of contents, is that something you would look at in your reading this document.

A. I think so.

[Page 6179]

Q. All right. Isn't the first thing on the table of contents on page 65 the paragraph concerning the U.S. community newspapers? The first item in the table of contents, is that right?

A. On page 65, yes.

Q. And do you see it talks about Lord Black and three senior executives getting non-compete money with the purchase of those papers?

Do you see that? "Lord Black and three senior executives entered into Non-Competition Agreements with the purchasers to which each agreed not to compete directly or indirectly," so on, do you see that?

A. I do.

Q. In the last line, does it not say "The company's independent directors have approved the terms of these payments." Right?

A. That's – it does – it says that.

Q. You missed that one, too?

A. That – that description is incorrect, and I missed it.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 1, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Recross-Examination of Marie-Josée Kravis]

[Page 6576]

* * *

Q. Well, the ones that you saw – the two 10-Ks and the proxy – that's public filings where the shareholders learned what you supposedly did at the audit – what the Audit Committee supposedly did; isn't that right?

A. Sir, as I testified yesterday, these disclosures were not complete. They did not include all – they did not include, for example, the monies transferred to Hollinger, Inc.

Q. I understand that.

But with respect to what you did in approving certain things – you're talking about what you may not have approved. I'm talking about the things that you did approve.

They would find that by the public filings, which would state whether you approved it or didn't; isn't that right?

A. Sir, we did not approve those non-competes.

Q. Notwithstanding the fact that you told, in filing after filing after filing that you did; isn't that right?

A. We did not approve those non-competes.

* * *

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 2, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY-ONE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Cross-Examination of James Thompson]

[Page 6927]

You testified that it was the Audit Committee's responsibility to review related-party transactions, right?

A. Right.

Q. So, I take it you read the related-party transaction section of this 10-K; is that right?

A. As I said previously, I skimmed the 10-K.

Q. Well, let's take a look at it. This is Disclosure Page 64 of the 2001 10-K marked as USA 006714.

The heading at the top said, "Related-Party Transactions," right?

A. Yes.

Q. We agree – we can agree, I take it – that the related-party section of this 10-K is two pages long, right?

A. Yes.

Q. It goes from Disclosure Page 64 to Disclosure Page 66, where you find the title, "Recent Accounting Pronouncements."

Do you see that?

A. Yes.

Q. And if there is any part of the 10-K that the Audit Committee would pay increased attention to, it is the related-party section, correct?

A. Presumably, yes.

Q. Did you say "presumably, yes"?

A. Yes, that's what I said.

[Page 6928]

Q. You would naturally have read this as part of your responsibilities as Chairman of the Audit Committee, right?

A. I said, Mr. Greenspan, that I had skimmed this document.

Q. And I want to focus your attention on the page marked as Disclosure Page 65, marked at USA 006715.

A. I'm looking at it.

Q. Now, I'm not going to make you read all this; but, if you can review the first paragraph of that page with, "During 2000," and just the jury can look at it as you're just reviewing it to yourself.

A. Right.

(Witness complies with request.)

Q. Are you done?

A. Yes.

Q. Do you see the last line up there (indicating)?

A. Yes.

Q. "The company's independent directors have approved the terms of these payments."

Now, this disclosure says that Conrad Black and others received individual non-compete payments in 2000 and 2001; isn't that right?

A. Yes.

Q. And you signed off on the 10-K, right?

A. Yes, I did.

Q. Now, if we can go to Disclosure Page 82, USA 006722, **[Page 6929]** that's your signature, correct?

A. Correct.

Q. And this 10-K is filed with the SEC, right?

A. Right.

Q. And just to be clear, the section disclosing the individual non-competes from the U.S. Community

newspapers is contained in this 10-K disclosure not once, but twice, right?

A. Right.

Q. So, you could have seen this disclosure three times: Once in the draft sent to you by Mr. Creasey and twice in the 10-K, right?

A. Right.

Q. And I want to move to another public filing, the proxy statements for the year 2002.

As I understand the way it works, a couple of weeks after the 2001 10-K is filed, you then look at the same – at the issue, again, in the 2002 proxy statement, right?

A. Right.

Q. So, if we can turn to the proxy–

MR. GREENSPAN: Which is Government Exhibit 9-G, your Honor. It's been admitted.

THE COURT: You may publish.

MR. GREENSPAN: May I publish?

THE COURT: Yes.

BY MR. GREENSPAN:

[Page 6930]

Q. It's at 31 of your binder.

Now, can we go to Disclosure Page 19?

I wonder if you could read that out, "In connection with the sales."

A. "In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Hollinger, Inc., the company, Lord Black

and Messrs. Radler, Atkinson and Boultbee entered into Non-Competition Agreements with the purchasers pursuant to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to the purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 and 2000 of $15,600,000, consisting of $7,197,500 paid to Lord Black, $7,197,500 paid to Mr. Radler, $602,500 paid to Mr. Atkinson, and 602,500 paid to Mr. Boultbee."

Q. Now, as you read it today –

A. Yes.

Q. – this disclosure spells out the exact amount that Mr. Black received as non-compete payments for the U.S. Community newspapers in 2000 and 2001, right?

A. Right.

Q. And it sets out specifically that Conrad Black received $7,197,500 for U.S. Community newspaper Non-Competition Agreements in 2000 and 2001, right?

[Page 6931]

A. Right.

* * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 7, 2007
Defendants,	)	9:00 o'clock a.m.

VOLUME THIRTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of David Radler]

[Page 7476]

* * *

BY MR. SUSSMAN:

Q. Sir, did you decide to go into business and start up this newspaper with Mr. Black?

A. It was a purchase, yes.

Q. Did you decide to purchase this newspaper with Mr. Black?

A. Ultimately, yes.

Q. And why did you decide to go into business and purchase this newspaper with Mr. Black?

MR. GENSON: Objection. We're talking about 1969.

THE COURT: Overruled.

You may answer that.

BY THE WITNESS:

A. Well, I was impressed with Mr. Black's knowledge and his ability; and, I thought he would, you know, be a great partner to have.

BY MR. SUSSMAN:

Q. Now, you mentioned that the Sherbrooke Record was an **[Page 7477]** English-speaking newspaper in a French area; is that right?

A. That's correct.

Q. Just by way of a little background, are there French-speaking areas of Canada and English-speaking areas of Canada?

A. Generally, that's the case, yes.

Q. Okay.

I didn't know these things. So, I'm trying to make it – take it from there.

Now, sir, where was – was this in a particular province, the Sherbrooke Record?

A. The Record was in – it was in – Quebec.

Q. Okay.

Now, did Mr. White go in on this deal with the two of you, as well?

A. Yes, he did.

Q. And how much did the three of you pay for the Sherbrooke Record in 1969?

A. We paid a gross of $50,000.

Q. And how much – when you say, "a gross of $50,000," what do you mean?

A. We – we – we bought the assets for $50,000, assumed $30,000 of liabilities, which gave us a net of $20,000 that we actually had to put up.

Q. Okay.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 8, 2007
Defendants,	)	9:00 o'clock a.m.

VOLUME THIRTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of David Radler]

[Page 7835]

* * *

Q. At the time you received the phone call from Mr. Black, what, if anything, did you believe about whether money had been set aside in the Paxton and Forum transactions for non-compete payments?

MR. GENSON: Objection, foundation.

THE COURT: Overruled.

You may answer if you can.

BY THE WITNESS:

A. I thought the money was there. I thought the money had been set aside.

BY MR. SUSSMAN:

Q. Why did you think the money had been set aside?

A. Because I had told Mark Kipnis prior to the closing of those deals about money to set aside.

Q. Why did you tell Mr. Kipnis to set aside money for individual non-compete payments?

A. Because I had told Mark Kipnis about the non-compete – **[Page 7836]** the individual non-competes.

Mr. Kipnis couldn't set aside the money, but he would have made the arrangements to see the money set aside.

Q. At the time that you received these – this phone call from Mr. Black and then made the phone call to Mr. McBride, how much did you believe had been set aside for individual non-compete payments?

A. About 3 percent of the proceeds.

Q. And how much would that be roughly, sir?

A. We're talking 72 million, so in excess of $2 million.

Q. What did you do after receiving the call – after having this phone call with Mr. McBride?

A. I realized that nothing had been set aside.

Q. What did you do next?

A. Well, I then checked with Mr. McBride on how much he had in what – what we described as his or what he described as his reserve accounts, and he

told me that he had $600,000 set aside in his reserve accounts that was available to take.

Q. I was going to ask you what – what are these reserve accounts, or what did you understand him to be referring to when he talked about reserve accounts?

A. On every transaction done in the United States, we held back funds at the American Publishing level in order to accommodate claims made by the buyers of us, of us the seller for – for things that – things that they – we may have **[Page 7837]** missed and working capital adjustments and things of that sort.

Q. A couple more questions.

Were payments eventually made to executives from the Paxton and Forum deal proceeds, from these reserve accounts you described?

A. Yes, they were.

Q. How did you decide how much to pay out to the individuals? Well, who were the payments made to?

A. They were made to the same four people.

Q. How did you decide how much to pay out to the individuals?

A. They were based on the same formula as the previous payment.

Q. When you say the previous payment, what are you referring to?

A. I'm referring to the CNHI payment.

Q. And who were the individuals that we're referring to, just to be clear?

A. Mr. Atkinson, Mr. Boultbee, Mr. Black and myself.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 9, 2007
Defendants,	)	9:00 o'clock a.m.

VOLUME THIRTY-FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of David Radler]

[Page 7934]

* * *

Q. Directing your attention to the fall of 2003, did you have a conversation with anyone about the Non-Competition – the actual Non-Competition – Agreements in the Paxton and Forum transaction?

A. Yes, I did.

Q. Who was that with?

A. It was with Mark Kipnis.

Q. Was this in person or over the phone?

A. It was in person.

Q. And who was present for this conversation?

[Page 7935]

A. To the best of my recollection, it was just Mark Kipnis and myself.

Q. What did you say to Mark Kipnis and what did Mr. Kipnis say to you?

A. I asked Mark Kipnis what had happened to the Paxton and Forum non-competes; why hadn't they been signed.

Q. Now, when you say the non-competes, are you referring to the money or the agreements themselves?

A. The agreement – I was talking about the – the agreements.

Q. And what, if anything, did Mr. Kipnis say?

A. He told me that he hadn't gotten around to producing the non-competes and – and – that there was no Non- – there wasn't a Non-Compete Agreement.

Q. Did you have an understanding as to whether the $600,000 in payments for the Paxton and Forum non-competes were related-party payments?

A. Yes, they – I considered them – I considered them related – related-party payments.

Q. And did you have this understanding on or around April of 2001?

A. Yes, I did.

Q. Did you ever advise the Board or the Audit Committee of Hollinger International about those payments?

A. No, I didn't.

[Page 7936]

Q. Why not?

A. Well, I – I – didn't think – first of all, the buyers hadn't really requested the non-compete payment; and, secondly, I knew that the non-compete – the process of creating this non-compete – payment was wrong.

* * *

[Page 7945]

* * *

BY MR. SUSSMAN

Q. Which is, sir: Why did you understand that you were signing a Non-Compete Agreement in this – for APC for your $2.6 million?

A. I was signing it because this was a tax – there was a tax – benefit in signing it.

Q. What was your understanding of what the tax benefit of signing the non-compete was?

A. That there was a good chance that it would be tax-free in Canada.

Q. What would be tax-free, sir?

A. The non-compete payment.

Q. Did you – at the time you signed this Non-Compete Agreement, did you – have any intention of competing with any **[Page 7946]** newspaper that APC owned?

A. No, I didn't.

Q. In fact, what was happening to APC as of February of 2001?

A. Well, as of February, 2001, APC had – really had – there was nothing left in it.

Q. And APC, itself, who was on the Board of APC?

A. I would have to look at the list, but I was on the Board and Conrad Black was on the Board. But I would have to look at the list for the others.

Q. So sir, did you under- – did you have an understanding – let me back up.

Is it fair to say that you received your $2.6 million for agreeing not to compete against a newspaper company that you were on the board of?

MR. ROMANO: Objection, leading.

MR. GENSON: Objection. Leading.

THE COURT: Sustained

BY MR. SUSSMAN:

Q. Sir, did you report your $2.6 million payment in the APC transaction on your income taxes?

A. No, I didn't.

Q. Why not?

A. Because I was advised by tax counsel that it wasn't required.

Q. Now, what, if anything, did you tell your tax counsel **[Page 7947]** about the fact that this was a Non-Compete Agreement set up solely for tax reasons?

MR. SAFER: Your Honor –

MR. GENSON: Objection.

MR. SAFER: – Mr. Radler's conversations with his tax counsel are hearsay, irrelevant –

MR. SUSSMAN: I don't think they are irrelevant, your Honor.

MR. GENSON: They certainly are hearsay.

THE COURT: Well, how are they not hearsay?

It is one thing to say what his state of mind was and why he did or did not do something, but why is not his conversation with his tax counsel hearsay?

MR. SUSSMAN: Let me rephrase.

THE COURT: Okay.

MR. SUSSMAN: Let me see if he can rephrase the question, your Honor.

BY MR. SUSSMAN:

Q. Did you advise the Audit Committee or the Board of Directors for Hollinger International that you had received – that you and other executives had received – $5.5 million payment for agreeing not to compete with an International subsidiary?

A. No, I didn't.

Q. Why not?

[Page 7948]

A. Well, at the time of the – of the – issuance of these checks, I was not aware that I was actually issuing money that belonged to Hollinger International, as opposed to money that belonged to Ravelston.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 16, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY-NINE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Cross-Examination of David Radler]

[Page 8992]

* * *

Q. I'd like to talk for a minute about APC.

The government asked you about money paid to you, Conrad Black, Jack Boultbee and Peter Atkinson for APC.

Do you recall that?

A. Yes.

Q. You received roughly $2.6 million, correct?

A. Yes.

Q. Mr. Black received roughly 6 – $2.6 million?

A. Yes.

Q. Mr. Atkinson and Mr. Boultbee each received $137,500, correct?

A. That's correct.

Q. You testified on direct examination that at the time of the issuance of these checks, you were not aware that you were actually issuing money that belonged to Hollinger as opposed to money that belonged to Ravelston.

Do you recall giving that testimony?

A. Yes.

Q. Mr. Sussman did not ask you why you believed that the money paid out of the APC belonged to Ravelston, but I'd like [**Page 8993**] to explore that with you for a moment.

You believed, did you not, that the APC payments were money that belonged to Ravelston because you understood that the APC payments represented a payment of management fees that had already been approved by the Audit Committee, correct?

A. Yes.

Q. And you understood that the Non-Compete Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay, correct?

A. Say that – there was a –

Q. You understood that the Non-Compete –

A. Right.

Q. – Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay?

A. Yes.

Q. Now, let's focus on management fees APC was supposed to pay in 2000.

I think you described it as a two-step process. Your responsibility was to meet annually with Governor Thompson and make a presentation regarding management services fees for Ravelston for the upcoming year, correct?

A. Yes.

Q. Once Governor Thompson agreed, the proposed fee would then **[Page 8994]** be presented to the Audit committee by Governor Thompson, as you described it, correct?

A. Yes.

Q. And I think you also said that with minor variation, Governor Thompson, at least as far as you were – when you were – involved in the process, always agreed with the recommendation you made to him?

A. Yes.

Q. Now, after the fees for the year were approved, an allocation has to be made by someone to the various International entities, correct?

A. Yes.

Q. You were not involved in the allocation process, correct?

A. That's correct.

Q. You understood that someone would have to determine how much of the management fee expense would be assigned for payment by each of the subs?

A. Yes.

Q. One of the subsidiaries of International that received management services was APC, correct?

A. Yes.

Q. That was the case in calendar year 2000?

A. Yes.

Q. Now, you attended the Audit committee meeting on February 22nd, 2000. Do you recall that?

[Page 8995]

A. Right. I would have to be –

Q. All right.

A. Yeah.

Q. Let me ask you to look at Tab 49.

Tab 49 has been marked Atkinson Audit 23, and they're the Minutes of the Audit committee meeting of February 22nd, 2000.

Do you recognize the Minutes?

A. Yes.

MR. ROMANO: It might be easier, your Honor, if I just offer them.

THE COURT: Any objection?

MR. SUSSMAN: No objection.

MR. NEWMAN: No objection.

MR. GENSON: No objection.

MR. SAFER: No objection, your Honor.

THE COURT: I will admit it, and you may publish it.

MR. ROMANO: Thank you, your Honor.

BY MR. ROMANO:

Q. Now, these Minutes are what we call Minutes of the Annual Meeting of the Audit committee, correct?

A. Yes.

Q. Early in the year, usually in February, the Audit Committee meets with the auditors and they go through the **[Page 8996]** annual ritual of retaining the outside audit firm and reviewing the audit plan for the year, correct?

A. Yes.

Q. Representatives of KPMG were present at this meeting, correct?

A. Yes.

Q. Pat Ryan?

A. Yes.

Q. Jim Winikates, someone called Dan Creamean?

A. I don't – I knew Pat Ryan, so I didn't know the others.

Q. They made a presentation about their auditing procedures and their major areas of audit, as they usually do annually, correct?

A. Yes.

Q. The Audit committee appointed KPMG as the auditors for the year 2000, correct?

A. I think the – I think they would recommend them, right? I don't know that they could appoint them, but –

Q. Fair enough.

Recommended the appointment of KPMG for the year 2000, and they were ultimately appointed, correct?

A. Yes.

Q. The Audit Committee also approved a 2000 annual payment of $24 million for the management services by Ravelston to International, correct?

[Page 8997]

A. I'm just looking that up.

Q. It's on the second page under Item 6 – Roman VI.

A. Yes.

Q. And the Audit committee approved a recommendation to the Southam Board that it approve a 2000 annual payment of $18.5 million for services provided by Ravelston to Southam, correct?

A. Yes.

Q. Now, you told Mr. Sussman that you had a conversation with Conrad Black in late December, 2000, or early January, 2001, about payments to executives totalling $5.5 million.

Do you recall that?

A. Yes.

Q. In early February, 2001, you asked Roland McBride to tell you whether there were proceeds remaining from various U.S. community sales.

Do you recall that?

A. Yes.

Q. Let me ask you to take a look at Tab 50, which is a document marked Atkinson Exhibit APC 5.

Do you see that?

A. Yes.

Q. Now, that's a memo from Roland McBride to you dated February 2, 2001, discussing unallocated reserves from various transactions.

[Page 8998]

Do you see that?

A. Yes.

MR. ROMANO: Your Honor, the gov- – your Honor, Mr. Atkinson – offers Defendant Exhibit APC 5 Atkinson.

THE COURT: Any objection?

MR. SUSSMAN: One moment, your Honor.

(Brief pause.)

MR. SUSSMAN: No objection, your Honor.

MR. SAFER: No, your Honor.

MR. CORBETT: No, your Honor.

MR. NEWMAN: I think it may – I'm sorry.

MR. ROMANO: Is it already in?

MR. NEWMAN: The answer to my question may be answered.

MR. SUSSMAN: I think Mr. Newman's right. It looks familiar to me at least.

MR. ROMANO: I'm happy to use the other number just to not clutter the record or –

MR. GENSON: Either way, there's no objection.

MR. ROMANO: – cause any confusion.

THE COURT: Mr. Genson, was there an objection from you.

MR. ROMANO: JB General 16, apparently.

THE COURT: Okay.

BY MR. ROMANO:

[Page 8999]

Q. This exhibit goes by two different names, Mr. Radler.

MR. NEWMAN: Anyway, I remembered one of my exhibits, Judge.

MR. ROMANO: May I proceed?

THE COURT: You may.

BY MR. ROMANO:

Q. Now, in this memorandum, whether it's JB General 16 or Atkinson APC 5, you're asking Mr. McBride for information about unallocated reserves, correct?

A. Yes.

Q. Now, a reserve is an amount that's set aside for future use, correct?

A. Yes.

Q. It's common when selling newspaper assets, isn't it?

A. Yes.

Q. An unallocated reserve is a reserve that's been – not been – identified for a specific purpose, correct?

A. Yes.

Q. You understood that APC had liabilities in 2000 for which it had set aside reserves, correct?

A. Yes.

Q. One of APC's liabilities was its obligation to pay a portion of the Ravelston management fee, correct?

A. Would you repeat that question?

Q. One of APC's liabilities was its liability – one of its **[Page 9000]** obligations – was to pay a portion of the Ravelston management fee?

A. Yes. I prefer "obligation." I agree.

Q. And the fee for 2000 had been approved by International's Audit Committee. we just saw that, correct?

A. Yes.

Q. So, on February, 2001, you instructed Roland McBride to make four payments totalling $5.5 million to you, Mr. Black, Mr. Boultbee, Mr. Atkinson effective year-end 2000, correct?

A. Correct. Correct.

Q. And you take a look at Tab 7 in the other binder, a document we've talked about already. It refers to a direction that you had given Mr. McBride.

Do you see that?

A. Yes. Yes, I do.

Q. Each of the recipients of these payments – you, Conrad Black, Jack Boultbee and Peter Atkinson – were then employed by Ravelston, correct?

A. Yes.

Q. You referred to these payments as bonuses that had been authorized.

Do you see that?

A. Just a moment.

In – in Tab 7?

Q. Earlier in your testimony.

[Page 9001]

A. Yes.

Q. Now, by signing –

MR. SUSSMAN: One moment.

BY THE WITNESS:

A. I'm sorry, I – that's –

(Brief pause.)

BY MR. ROMANO:

Q. Now, by signing the APC Non-Competition Agreement, there was a good chance – or at least a reasonable prospect – that the payment would be free of taxes in Canada, correct?

A. Yes.

Q. And when you gave the instruction that you gave, you understand – you understood – that the payment was part of unpaid, but approved management fees owed to Ravelston, correct?

A. Yes.

MR. ROMANO: May I have a moment, your Honor?

THE COURT: Yes.

(Brief pause.)

MR. ROMANO: I have no further questions.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 17, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Recross-Examination of David Radler]

[Page 9356]

* * *

Q. Okay.

Now, Pioneer was a group of newspapers within the – I'll say the – ambit of the Illinois area?

A. Yes.

Q. And were they a group of newspapers that were, in fact, bought, it not entirely but partially by International or APC?

A. They were bought by International, I believe.

Q. I'm sorry, sir, I couldn't hear you?

A. I thought they were bought by International, yes.

Q. Was it all of Pioneer, that was bought by International?

A. Just a moment.

Pioneer, it's an old deal; but, yeah.

Q. Was it a large number of newspapers?

A. Yes.

Q. More than the 59 that were piled up here?

A. I can't remember.

Q. Can't remember?

A. The titles.

Q. Fair enough.

I think you told me, however, on cross-examination that when I showed you the list of 59 newspapers, you said **[Page 9357]** there were many more at the time that you were terminated?

A. That's correct.

Q. And you couldn't guess for me, you thought somewhere in the neighborhood and you gave me, I think, seven dailies or something like that and maybe a hundred of some other kind.

Was that a fair summary?

A. That's a fair summary, yeah.

Q. Now, sir, it's fair, is it not, that the newspapers that International bought from Pioneer of which this was a part was a very valuable asset?

A. Yes.

Q. Of International's?

A. Yes.

* * *

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 24, 2007
Defendants.	)	1:25 o'clock p.m.

VOLUME FORTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Cross-Examination of Lancelot Bloomfield]

[Page 10685]

* * *

Q. And those television cameras were in place – or the screens were in place – long before May of 2005?

A. No.

Q. They were put in in May?

A. We had closer to May, 2005, we had a more advanced –

Q. Right, you had a new system put in?

A. Yeah.

[Page 10686]

Q. And by that you meant, there was some more cameras installed?

A. It was – it was – a digital system. It was more advanced. You could see things clearer and it could – you could – get immediate rewind.

Q. So, you caught up with technology and you put in a digital system?

A. Yeah.

Q. And in the security office were the television screens where you could see the cameras?

A. Uh-huh.

Q. Were those screens in place before May of 2005? That's my question.

A. It's around that time.

That particular new system, it's around that time.

Q. And how would you monitor the cameras before May of 2005?

A. Well, we had – it was a tape system.

Q. So, everything was recorded?

A. Yeah. Then you had to rewind. You couldn't immediately – you had to rewind. Much more.

Q. So, you could watch it –

A. Oh, yeah.

Q. – before May of 2005?

A. Oh, yeah.

Q. It was more complicated because it was a tape; you had to **[Page 10687]** rewind it?

A. Oh, yeah.

Q. Now, in back here (indicating) – this (indicating) is the back where it says "Parking Lot"; isn't that right?

A. Yeah.

Q. And do you see where it says "C2"?

A. Uh-huh.

Q. That's a camera, right?

A. Yeah.

Q. And do you see where it says "C6"? That's another camera?

A. Oh, yeah.

Q. And there was always a camera in back –

A. Oh, yeah.

Q. – isn't that right?

So, the camera in front was in place for a long time, as well as the camera in back?

A. Yeah.

Q. And which camera in back was there for a long time?

A. At least one of those must be there for a while.

* * *

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 29, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FORTY-FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Cross-Examination of Shahab Mahmood]

[Page 10766]

Q. You told us about the cameras at 10 Toronto Street.

When you started working there in May of 2000 – or when you started working there in 2003 – there were four cameras there?

A. Yes.

Q. Where were those four cameras located?

A. One was at the front door, one at the parking lot and two on east side of the building.

* * *

[Page 10777]

* * *

Q. And this was on a Friday, a weekend before Victoria Day in Canada?

A. Yes, that's right.

Q. Now, what's shown in that top left corner is the parking lost; is it not?

A. This is the parking lot (indicating).

Q. The parking lot for 10 Toronto; isn't that right?

A. Yes.

Q. To get to that parking lot, there's an alley or a gangway that goes on each side of the building; isn't that right?

A. The alley's on the far right side.

Q. And, so, a car has to drive in there; and, the parking lot at 10 Toronto is surrounded by a wrought iron fence; isn't that true?

A. Yes.

Q. Now, sir, in that top left-hand corner at eight minutes after 5:00 on the weekend before Victoria Day, I see one, two, three, four, five, six, seven, eight, nine cars parked.

[Page 10778]

Do you see that?

A. Yes.

Q. And it looks, as far as we can tell, there might be two empty parking spaces at five after – at eight minutes after – 5:00; is that right?

Do you recall that?

A. Yeah.

Q. You were watching this from your security desk; were you not?

A. Yes.

Q. And you saw those cars parked in that parking lot; isn't that right?

A. Yes.

Q. There was a bunch of inspectors in the building at that time, wasn't there?

A. Yeah, there might be.

Q. Now, if you look on the top right-hand corner –

MR. MARTIN: And maybe we can play that tape now, Jackie.

(Whereupon, said tape was played in open court.)

MR. MARTIN: Okay. You can stop it.

(Brief pause.)

BY MR. MARTIN:

Q. Did you see a person pointing his finger – his right hand up towards –

[Page 10779]

A. Yes.

Q. Was that the camera he was pointing at?

A. Yeah, there is a C3 camera.

Q. The C3 camera.

And do you recognize that person to be Conrad Black?

A. Yes.

Q. Okay.

So, what you saw was Mr. Black walk down the stairwell and point his right hand up towards the camera; isn't that right?

A. Yes.

Q. And he was in the company of Mr. Hillier; isn't that true?

A. Yes.

Q. And Joan Maida?

A. Yes.

Q. Isn't that right?

A. That's right.

MR. MARTIN: And, then, Mr. Hillier.

MS. RANKIN: It's on the screen here (indicating).

(Brief pause.)

MR. MARTIN: Here you go.

BY MR. MARTIN:

Q. On the bottom left-hand corner, do you recognize where the arrow is pointing to the gentleman's face?

A. This is the chauffer, John.

[Page 10780]

Q. Is he looking up at a camera?

A. Yeah, I think so.

* * *

[Page 10781]

* * *

Q. The cameras that were in place would have also captured people leaving after 5:08, after that video we just saw; isn't that right?

A. From the back door?

Q. From the front door, from the back door, either door.

A. Yeah.

Q. So, that's on camera. We can see people leave?

A. Yes.

Q. And do you recall that employees at 10 Toronto Street were leaving after 5:10 in the afternoon?

[Page 10782]

A. Yeah.

Q. Okay.

And some left before 5:00; isn't that right?

A. Yes.

Q. But the building wasn't vacant at 5:00 o'clock in the afternoon –

A. No –

Q. – was it?

A. – not vacant.

Q. Okay.

* * *

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 29, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FORTY-FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Monique Delorme]

[Page 10822]

Q. And was anyone else a participant in the conversation besides you, Mr. Vale and the woman from the inspector?

A. No.

Q. What did you say to her and what did she say to you?

A. We asked her that we wanted to take some documents or some boxes – remove some boxes – and that we needed the inspectors to review the content of the boxes and sign off and authorize for them to be removed from the building.

Q. And what, if any, response did she give to you?

A. She told me that she couldn't do that, that I would have to speak with somebody more senior.

Q. Did you seek out somebody more senior at that point?

A. Yes.

Q. And where did you seek them out?

A. We left the inspection – or that small Board room where the inspectors were -- and we went down to the First Floor, where the larger Board room was, and the other inspectors.

Q. And let me just ask you, Ms. Delorme, at any point in this sequence of events going up and down, did you see Mr. Bloomfield, again?

A. Yes.

Q. At what point in the sequence of events did you see Mr. Bloomfield?

A. As we were leaving the Third Floor Board room, we came into a small hallway; and, again, we ran into Lance **[Page 10823]** Bloomfield, who had come up the back stairs and said that he had brought the boxes out, as we had discussed earlier.

Q. At that point, did you give Mr. Bloomfield any instructions?

A. Yes.

Q. What instructions did you give him?

A. We – I guess I did, but on behalf of Don and I – apologized and said he had to bring the boxes back in, that the inspectors were going to have to look at them before they were released.

Q. At that point, as far as you know, did Mr. Bloomfield go to do that?

A. Yes, at that point, he – we went down the back stairs and he went out to bring the boxes back in.

Q. Now, you indicated that you went to speak with someone with more authority among the inspectors on the First Floor. Did you find someone –

A. Yes.

Q. – that afternoon?

A. Yes.

Q. And do you recall who you spoke with?

A. Yes, Brian Denega.

Q. And who was there during that conversation?

A. Don Vale and I myself and Brian Denega.

Q. What did you say to Mr. Denega and what did he say to you?

[Page 10824]

A. We requested that he would review the content of some boxes that we intended on removing from the building and that he sign off his authority.

Q. And what did Mr. Denega say in response?

A. He said that there was a protocol that was being established between his lawyers and our lawyers;

and, that until it was complete, he was not willing to sign off on the boxes nor inspect the boxes.

* * *

[Cross-Examination of Monique Delorme]

* * *

[Page 10874]

* * *

Q. Ms. Delorme, I don't remember whether I asked you this, but the inspectors that arrived after December of 2004, were they there on a daily basis?

A. Yes.

Q. Now, there were times when you, yourself, needed to remove documents from the building; were there not?

A. Yes.

Q. And if you wanted to take a document home to work on, you didn't necessarily go through the inspector signing off on it, did you?

A. No.

Q. You'd bring the document back the next day, would you?

MR. SISKEL: Objection.

[Page 10875]

BY THE WITNESS:

A. Yeah, I –

MR. SISKEL: If we could clarify time frame.

THE COURT: Sure.

BY MR. MARTIN:

Q. After the –

THE COURT: Clarify time frame.

BY MR. MARTIN:

Q. – the court order was in place after December of 2004.

A. Yeah, I wasn't taking out original documents, but copies of documents.

Q. And you didn't go up to the inspectors and tell them what you were doing, is my question.

A. No. We had worked it out that officers of the company could take documents home to work for the night.

Q. And if you had to leave the building for a meeting, you brought documents. You didn't go through the inspectors to bring documents with you, did you?

A. No.

* * *

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 31, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Jennifer Owens]

[Page 11341]

* * *

Q. Now, after receiving the letter and after receiving the telephone call, do you recall if you contacted anybody about those contacts?

A. Yes.

Q. Who did you contact?

A. Alex Bourelly and Dan Rosenthal.

Q. Who is Alex Bourelly?

A. Alex Bourelly is a partner at Baker, Botts, and he worked on the case with me. He's, basically, my boss.

Q. He's a lawyer?

A. Yes.

Q. He worked on the Conrad Black SEC matter with you?

A. Yes.

Q. Okay.

Was Alex – were you in your Washington office on that day –

A. Yes.

Q. – May 19th?

Was Alex Bourelly in the Washington office?

A. No, he was actually here in Chicago.

[Page 11342]

Q. How did you communicate with him?

A. I forwarded him Kay's e-mail via – Kay's letter via e-mail.

Q. You mention a Dan Rosenthal. Who is he?

A. He is an attorney at Williams & Connolly.

Q. And Williams& Connolly, again, was Mr. Black's old lawyers?

A. Yes.

Q. Was Mr. Rosenthal a friend of yours, also?

A. I know him.

Q. How did you contact Mr. Rosenthal?

A. The same way. I sent him an e-mail.

Q. At any time on May 19th, 2005, did you have an in-person conversation with Conrad Black?

A. No.

Q. At any time on May 19th, 2005, did you send an e-mail to Conrad Black?

A. Not to my recollection.

Q. At any time on May 19th, 2005, did you telephone Mr. Black?

A. Not to my recollection.

Q. Turning your attention to the next day, do you recall what day of the week that was?

A. Friday.

Q. At any time on May 20th, 2005, did you have an in-person [**Page 11343**] conversation with Mr. Black?

A. No.

Q. Did you e-mail Mr. Black?

A. Not to my recollection.

Q. Did you telephone Mr. Black?

A. Not to my recollection.

Q. Did you have any type of communication with Mr. Black on either of those days: May 19 or May 20th?

A. Not to my recollection.

Q. Did there come a time when you received the SEC request for documents?

A. Yes.

Q. Do you recall when that was?

A. I actually got them the following Monday, which was May 23rd.

* * *

[Page 11346]

Q. Okay.

Are you able to identify what documents were produced to the SEC by virtue of those prior subpoenas?

A. Yes.

Q. And how are you able to identify that?

A. When you produce documents, you always put what's called a Bates stamp on it. So, you know – you know – what – who is producing the document, what page number it is. So, all of those documents have the same Bates stamp.

Q. I just want to show you some documents – copies –

MR. MARTIN: That were previously introduced into evidence and published yesterday, your Honor.

THE COURT: Okay.

[Page 11347]

MR. MARTIN: And I have a separate Black number on them.

THE COURT: Are you going to use the Elmo, then?

MR. MARTIN: I am going to use the Elmo.

(Brief pause.)

BY MR. MARTIN:

Q. Ms. Owens, do you recognize what's on the Elmo?

A. Yes. It's the APC non-compete.

Q. Are you aware of whether this had been produced to the SEC prior to May 19th, 2005?

A. Yes, the first document that was produced.

Q. How do you know it was the first document that was produced?

A. Well, you can see the Bates stamp "CMB," that's the Bates stamp for this production, and it's Page 1.

* * *

[Cross-Examination of Jennifer Owens]

[Page 11358]

* * *

Q. You do securities litigation, you do complex business litigation and you're a white collar defense lawyer, right?

A. Yes.

Q. And one of – and there's an intersection of those things, right?

A. Yes.

Q. I mean, it's not uncommon that someone would represent – do SEC litigation and do white collar defense, right?

A. No.

Q. Because a lot of times what happens is what begins as an SEC complaint turns into or can turn into a criminal case, right?

MR. MARTIN: Object to what happens a lot of times, your Honor.

MR. SUSSMAN: I'll rephrase the question.

THE COURT: Rephrase it.

BY MR. SUSSMAN:

Q. What can happen is an SEC investigation can turn into a criminal investigation, correct?

A. It could.

Q. Well, I mean, it has, in your experience, right?

A. Yes.

Q. Okay.

And, I mean, you've represented – not just in this **[Page 11359]** action, but in other cases you have represented – individuals where an SEC action turned into a criminal action, correct?

A. I don't think that – I don't think so.

Q. This is the only time that's happened?

A. I think that's – that I've represented personally.

Q. Okay.

Your firm has – you're aware that your firm has certainly handled those types of matters, correct?

A. I would think so.

Q. And you were aware when you took over this case and began working on – or when you began working on it – that this case had criminal implications, correct?

You were aware of that from the moment you started on this case, weren't you?

A. What do you mean?

Q. Well, you were aware that Mr. Black's rights were implicated not just for SEC purposes, but also for criminal purposes, correct?

A. In the – with respect to the SEC action?

Q. Yeah, with respect to the SEC action –

A. Yes.

* * *

[Page 11368]

* * *

Q. Do you recognize what I'm showing you, Black Boxes 1 – CMB 00001?

A. Yes.

Q. Let me ask you a couple questions about this document.

First off, do you know whether that's an original or a copy.

A. Well, that's a copy.

Q. But, I mean, is that a copy of the original or a copy of a copy?

A. I do not know.

Q. Okay.

Do you know where that document came from?

A. No. We didn't do that production.

Q. Well, I mean, if you had done – have you – do you know whether this document came from Mr. Black's personal files at 10 Toronto Street?

[Page 11369]

A. No.

Q. You don't, do you?

I mean — and, in fact, there's no way to tell, correct?

In other words, you don't know whether this came from Hollinger's offices; you don't know whether this came from documents that were at the Telegraph offices; you don't know whether this came from a secretary's desk; you don't know exactly where this document came from, do you?

A. No, but it's clearly from Conrad.

Q. Well, in the sense of it's clearly from Conrad's lawyers, right?

A. You only produce things in your client's possession, custody, or control.

* * *

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 31, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Alex Bourelly]

[Page 11402]

* * *

Q. Did you receive a communication from Ms. Owens?

A. I did.

Q. Do you recall what Ms. Owens conveyed to you?

A. She conveyed to me that the SEC was going to be sending a document request to us shortly; and, that the SEC was going to be providing documents to us.

Q. Did you see an actual document request at that time?

[Page 11403]

A. I didn't. The – the – request came via right fax, which is a – the way we receive faxes in our office.

And, so, it came – it comes "right fax" is – it's, basically, an e-mail transmission, but on the Blackberry, you can't open it. So, I couldn't see what – what the letter said. She just summarized it for me.

Q. And on May 19th, did you actually see a formal document request –

A. No, I did not.

Q. – is the question?

A. No.

Q. What you were just referring to was a letter or a fax from the SEC?

A. Yeah, a fax from the SEC, correct.

Q. Did you see that?

A. No, I didn't, not at the time.

Q. Was your only communication with Ms. Owens on May 19th in the afternoon hours by e-mail?

A. Yes.

Q. Okay.

After receiving that e-mail from Ms. Owens, did you make any attempt to contact Mr. Black?

A. I made no attempt – to the best of my recollection, I made no attempt – to contact Mr. Black.

Q. Did you try to e-mail him?

[Page 11404]

A. I did not.

Q. Did you try to call him?

A. I did not.

Q. Directing your attention to the next date, May 20th, 2005, do you recall what day of the week that was?

A. The next day would have been Friday.

Q. On Friday, May 20th, 2005, did you e-mail Mr. Black?

A. To the best of my recollection, I did not.

Q. Did you have any sort of telephone conversation with Mr. Black?

A. To the best of my recollection, I did not.

Q. Did you have any sort of in-person conversation with Mr. Black?

A. I did not.

Q. Any communication whatsoever on May 20th, 2005, with Conrad Black?

A. To the best of my recollection, no.

* * *

[Cross-Examination of Alex Bourelly]

[Page 11405]

* * *

Q. Mr. Bourelly, you do white collar criminal work, as well as civil work, correct?

A. That's right.

Q. And you do SEC – some SEC – work because you testified you formerly work with the SEC?

A. Yes, I do.

Q. And you understand there's oftentimes what we'll call a convergence of the two, in terms of the criminal investigation and – an SEC's investigation and a criminal investigation.

In many instances, what begins as an SEC investigation, it's not uncommon that that eventually becomes a criminal investigation?

[Page 11406]

MR. GENSON: That's about three questions. I object.

MR. SUSSMAN: You're right.

THE COURT: Sustained.

BY MR. SUSSMAN:

Q. You're aware of that, correct?

A. Well, I'm aware of the occurrence where the SEC will begin an investigation and the United States Attorney's office will take over and start investigating, and they'll start their investigation.

Q. You said it much better than I did.

And that's not uncommon, correct?

A. Unfortunately, in these – this day and age, it is not uncommon.

Q. Okay.

And you knew in the spring of 2005 – say, March, April, 2005 – you knew that the U.S. Attorney's office in Chicago had begun a criminal investigation of Mr. Black, correct?

A. I – I – believe I did know that, yes.

Q. And you know, as a former federal prosecutor, that a grand jury investigation and a federal criminal investigation are pretty much one and the same, correct?

A. I think that's fair to say.

* * *

[Recross-Examination of Alex Bourelly]

[Page 11422]

* * *

Q. Now, Williams & Connolly also represented Mr. Black in the criminal matter that was the kind of pending criminal matter, right?

[Page 11423]

MR. MARTIN: Your Honor, I object to that. There was no pending criminal matter.

MR. SUSSMAN: Well, I'll rephrase the question.

THE COURT: Rephrase.

BY MR. SUSSMAN:

Q. Williams & Connolly actually began representing Mr. Black well before criminal charges were filed in the case, correct?

A. Before – yes, before – the indictment.

Q. Well before the indictment, correct?

A. Yeah, that's probably right.

Q. And Mr. Craig and Mr. Sullivan represented Mr. Black all the way back in the spring of 2005, correct?

A. In the – yes, that's correct.

Q. So, right around probably before the time that the government filed – the government formally advised Mr. Black of criminal charges, he had already hired lawyers at Williams & Connolly to represent him?

MR. GENSON: Objection.

MR. MARTIN: Your Honor, again, there are no criminal charges.

THE COURT: Rephrase.

BY MR. SUSSMAN:

Q. Long before an indictment was filed against Mr. Black or returned against Mr. Black, he had hired criminal lawyers from Williams & Connolly, correct?

[Page 11424]

A. Correct.

Q. And not just –

MR. GENSON: Objection.

Your Honor, I move that be stricken. Williams & Connolly are not all – are not just criminal lawyers. It's a big law firm.

THE COURT: Objection on form. Rephrase –

BY MR. SUSSMAN:

Q. He hired –

THE COURT: – the "criminal lawyer" part.

BY MR. SUSSMAN:

Q. – Mr. Sullivan and Mr. Craig, correct?

A. Yes.

Q. And Mr. Sullivan is a very famous criminal lawyer, right?

A. He's a very famous lawyer.

Q. I mean, he's a very famous criminal lawyer, right? He represented Oliver North, right?

A. Correct.

Q. And Mr. Craig is also a very famous criminal lawyer, correct?

A. He's fairly well known, yeah.

Q. I mean, it may not have been in a criminal case, but he represented former President Clinton, correct?

A. I'm not certain about that.

Q. Okay. But they were handling criminal matters for **[Page 11425]** Mr. Black even prior to his indictment, correct?

MR. GENSON: Objection, Judge.

THE COURT: Sustained.

* * *

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois May 31, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME FORTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Joan Maida]

[Page 11433]

* * *

Q. Did you get any notice of – did you receive notice that in fact you were being – you had to leave the office – eviction notice?

A. Yes.

Q. And when did you have to leave the office by?

A. The 31st of May.

Q. Okay.

And, so, were you going to continue to work for Conrad Black?

A. Yes, I was.

Q. And where was your office going to be?

A. I was setting up an office at my home.

Q. Now, directing your attention specifically to May 20th, 1995 – or 2005 – did you go to 10 Toronto that day?

A. Yes, I did.

Q. Was it a regular workday?

A. Yes, it was.

Q. And you got there about what time?

A. About 9:00 o'clock.

Q. Now, did is Conrad keep any papers or documents in his office?

[Page 11434]

A. No.

Q. And where were the documents kept at –

A. All the –

Q. – 10 Toronto?

A. – files were kept in my office.

Q. Now, after you got to 10 Toronto on the Second Floor, what did you do? What did you start doing?

A. Probably I had a coffee, and then I – I know I – just did some routine things; and, at some point during the morning, I started packing some boxes. I put some files in some boxes.

Q. And what kind of files did you put in the boxes?

A. My – my – files that I had in my office.

Q. And –

A. Personal files.

Q. Were they separate documents or were they in file folders, if you remember?

A. No, files.

Q. And the documents that you put in, had you had any conversation with Conrad Black before you took those documents and put them in the boxes?

A. No, I did not.

Q. Did you have any – was there any notes, memos, e-mails that suggested which documents you should take?

A. No.

[Page 11435]

Q. Do you know generally the topics of some of the documents you took right now? Do you remember?

A. I took – I know I took – files with personal pictures and kid stuff and some of Barbara's files I had.

Q. Were there any files with regard to any of the references – or any of the residences, I mean –

A. Yeah.

Q. – of Mr. Black?

A. Yeah.

Q. And could you tell us what that would be?

A. There were files on his apartment in New York.

Q. And what else?

A. There was Palm Beach files.

Q. And anything else?

Do you remember a place called Cottesmore?

A. Cottesmore Gardens?

Q. Cottesmore, yes.

Where was that?

A. Yeah. That was in the UK.

Q. Were those some of the files you took; if you remember?

A. Yes. Yeah.

Q. About how many boxes would you say you had packed in your office; if you know?

A. I think I packed four or five boxes.

Q. Now, where were you going to take these boxes?

[Page 11436]

A. Home.

Q. Oh, by the way, were there some boxes there that had already been packed, in addition to the four or five?

A. Yes, there were. There were a lot of boxes in my office.

Q. And you were going to take them to your home?

A. Well, eventually, I wanted to take them home.

Q. Did you plan, when you came in, to take those boxes to your home that day?

A. No.

Q. Had Conrad, again, told you that you should take any of these boxes to your home?

Did you talk about this specifically?

A. No.

Q. Again, did Conrad choose the documents that you packed?

A. No.

Q. To your knowledge, had he ever looked inside any of the boxes that were packed –

A. No.

Q. – and in the office that day?

A. No.

Q. Now, going back a little before May 20th, did you have occasion to be familiar with a law firm called Sullivan & Cromwell?

A. Yes.

Q. And who were – to your knowledge, who were – they **[Page 11437]** employed by?

A. Who were they employed by?

Q. Yeah. Who did they work for?

A. Conrad.

Q. And did you have occasion prior to that date to seeing lawyers from Sullivan & Cromwell in your office?

A. Yes.

Q. And can you tell us what they did when they came to your office?

A. Well, they photocopied everything.

Q. How long were they photocopying?

A. They were there a long time. They were there weeks.

Q. A week.

And what they were doing –

A. I would say more than a week. Weeks.

Q. And how many people were there?

A. I don't remember exactly. There were a number of them.

Q. To the best of your knowledge, was there anything in that office that they didn't photocopy?

A. No.

Q. Did you have occasion to have in your office any public filings, 10-Ks, proxies, things like that?

A. I did.

Q. Did they even photograph that?

A. They did.

[Page 11438]

Q. Now, during the previous years – again, years, a few years before May – before 2005 – did you have occasion to have requests from other lawyers to contact you to make copies of documents?

A. People asked me to make copies of documents, yes.

Q. And did you make those copies as requested?

A. Yes, I did.

Q. Getting back to May 20th, again, when you came to the office that day, was it your plan to pack or remove boxes from that office?

A. No. I was just getting ready to move.

Q. Now, were there other people that officed in the building in May of 2005?

A. Yes.

Q. And were these people that worked for Conrad or people that worked for other organizations there?

A. There were – I'm sure there were other people that worked for – there were probably lawyers in the building and – and staff.

Q. Did anyone – did anyone stop by your office to speak with you that day?

A. Yes.

Q. And could you tell us what his name was?

A. Mr. Don Vale.

Q. And what was John – what was Mr. Vale's job?

[Page 11439]

A. He was the President and Director of the company.

Q. And did you – had you known Mr. Vale prior to that day?

A. Yes.

Q. Were you familiar with him?

A. Yes.

Q. You had talked to him from time to time?

A. From time to time.

Q. You were friendly, were you?

A. He was – he was – friendly, yes.

Q. Did you have a conversation with Mr. Vale at the time he came to your office?

A. I did.

Q. Was there anybody else present at the conversation?

A. No.

Q. Could you give us an estimate as to what time you might have had this conversation with Mr. Vale?

A. I'm not really sure. Maybe around 1:00 o'clock, but I can't say for certain.

Q. Okay.

And do you recall what he said and what you said during that conversation?

A. He passed by my office and he said to me – he was – he – he greeted me. He said, "Hello, Joan." He was very friendly.

And he said, "Is there anything I could do for you," [**Page 11440**] in a very friendly way.

And I said, "As a matter of fact, I'd like to take some files home."

Q. Okay.

And after you said that, did you show him the files or –

A. I did.

Q. And what did he do when you showed him the files?

A. He looked at them.

Q. Now, were you aware generally of a rule – at least in that building – relative to getting permission to take files out of there?

A. Yes, I was.

Q. And do you recall how you became aware of it; whether you read it, someone told you; do you know?

A. I don't know. It was – I think it was pretty much general knowledge that –

Q. And after – and, so, he – he went and you said he looked at the file boxes, did he?

A. He did.

Q. And what did he say after he looked at the file boxes?

A. He said I could take them.

Q. At the time that you had this conversation with Conrad – with Vale, Mr. Vale – had you spoke to Conrad Black about moving the files?

[Page 11441]

A. I had not.

Q. Had you spoke to Conrad Black as to which files – as to which files – you were going to take?

A. No.

Q. At some – after you had that conversation with Mr. Vale, did you believe you had permission to take those boxes out of the office?

A. Yes.

Q. What –

MR. CRAMER: Objection. Objection.

MR. GENSON: It's her state of mind to show what she did, your Honor.

THE COURT: Overruled.

BY MR. GENSON:

Q. Did there come a time, did anyone come to get the boxes and move them?

A. Yes. I called Mr. Bloomfield, one of the security guards that was working at the – at there.

Q. And did he come up?

A. Yes, he did.

Q. Did he have something with him when he came up?

A. I'm not certain.

Actually, I'm not even certain if he was on – he might have been on the floor, but I – I – I spoke to him and I asked him if he would take the boxes to my car.

[Page 11442]

Q. And did he take the boxes to your car?

A. Yes, he did.

Q. Did he carry them or did he push them? How did he get –

A. No, he took –

Q. – the boxes?

A. He – he – got a – a dolly.

Q. And your car was parked, where?

A. Outside the back.

Q. Outside the back?

A. In the parking lot.

Q. In the parking lot.

And how did he gain access to your car; if you know?

A. I would have given him my keys.

Q. And did he take any – and did you see him leave from your office or from the offices with those boxes, did you?

A. I saw him take them out of my office.

Q. Sometime later – by the way, did you see him load them in your car?

A. I don't recall seeing him loading them in my car.

Q. Sometimes later, did you receive a call from Mr. Bloomfield?

A. Yes, I – yes, I think it was him that called me.

Q. And where were you when you received that call?

A. I was in my office.

Q. And at that point, do you remember what Mr. Bloomfield **[Page 11443]** said to you and you said to Mr. Bloomfield?

A. Yes. He said he had been told to re- – to bring the boxes back. And I said, "Then bring them back."

Q. Okay.

And at that point of time, did you tell him where to bring the boxes?

A. Yes. I told him to put them inside the back door. I didn't want them in my office. I didn't want any more boxes brought up. I mean, there were – I asked him to stack them inside the back door.

Q. Did you go back and talk to Mr. Vale or anybody else after Mr. Bloomfield called you?

A. No, I did not.

Q. After Mr. Vale – Bloomfield – after you talked to Mr. Bloomfield, did you have a conversation with Conrad Black?

A. Yes, I did.

Q. Was it by phone or on purpose – or on person?

A. I spoke to him on the phone.

Q. And was there any – you recognized his voice. You've talked to Conrad Black many times, have you?

A. Of course.

Q. And could you tell us if anybody else, to your knowledge, was on the phone with him, with you, other than Conrad Black?

A. Not that I'm aware of.

Q. And had you talked to Conrad Black prior to that phone **[Page 11444]** call on that day?

A. I don't believe so.

Q. And after that phone call, do you recall seeing him – Mr. Black, I mean.

A. He did come into the office later.

Q. How long after the phone call did he come in?

A. I – I don't remember how long it was. It was –

Q. Where were you when you first saw him, Ms. Maida?

A. I was in my office.

Q. And did he come into your office, did he?

A. Yes, he did.

Q. Now, did you talk with him?

A. Well, we – yes. I – yeah. I don't know what we said exactly.

Q. After he was in your office for a period of time – did he go anywhere after that conversation?

A. Yeah, he – he went – I – he went somewhere else in the building.

Q. And do you know, how long was he gone, ma'am?

A. Oh, you know what? I really don't know exactly how long. Maybe an hour.

Q. And at some point after that, did he come back?

A. Yes.

Q. Did you have a conversation with him then?

A. Yes. He asked me to show –

[Page 11445]

Q. Well –

A. Sorry.

Q. I got to go through all these things.

A. Excuse me?

Q. Did anyone else – was there anybody else there?

A. Excuse me?

Q. The conversation, where did this conversation – the one after he came back – take place? Where were you?

A. When he came back to the office? I was in my office. He came back –

Q. In your office.

A. – into – into his office.

Q. These are rules I got to follow. I'm not very good at it, so you got to help me here.

So, now, after he gets – after he's in your – was there anybody present when he had this conversation with you?

A. No.

Q. And what did you say to him and what did he say to you?

A. He wanted to know where the boxes were. I had told him what had happened and that I was – you know, that I – that Mr. Bloomfield had put some boxes in my car and that he was told to remove them. And he asked me to show – "Show me where the boxes were."

Q. All right.

And what did you do?

[Page 11446]

A. I went and showed him where the boxes were.

Q. All right.

At some point when you showed him, did anybody – did a third party join you?

A. Yes.

Q. Who was that third party?

A. John Hillier.

Q. And John Hillier was his driver, was he?

A. That's right.

Q. Had you seen John Hillier before you go in to see – to look at – for the boxes? Did you see him before then?

A. No.

Q. Now, where did you go after you – when he asked you to show him the boxes, where did you go?

A. After I showed him where the boxes were.

Q. And where were the boxes, again?

A. At the basement stairs. They were packed at the bottom of the stairs in the – at the back door.

Q. And, then, you went down there with him?

A. That's right.

Q. And what do you remember happening at the point you went down there with him?

A. He – he – wanted to take the boxes out and he picked up a box and gave it to John Hillier and –

Q. All right.

[Page 11447]

At that point of time, did you know whether or not Conrad Black had permission to take those boxes?

A. No.

Q. You don't know one way or the other?

A. (Shaking head.)

Q. When he started – you can't shake your head. You got to answer so the –

A. Sorry.

Q. – Judge and the good-looking fella with the red hair can see you.

(Laughter.)

BY MR. GENSON:

Q. At the time, did you see them move the boxes out?

A. I saw them move some boxes out.

Q. All right.

How long – did you stay there at that point?

A. No.

Q. Where did you go?

A. I went back up to my office.

Q. Now, did there come a time when you saw Mr. Black, again, that day?

A. He came – he came – back in to the office.

Q. All right.

Had you seen where he put the boxes or where they put the boxes?

[Page 11448]

A. No.

Q. To your knowledge, did they put them back in your car?

A. No.

Q. And did you see the boxes after that, again?

A. No, I did not.

Q. Now, were there any security cameras in or around the building?

A. Yes.

Q. And how long had they been there, to your knowledge?

A. Since I was – since I first worked there, there were security cameras.

Q. Were there – and the little ante-way before you go out, did you know there was a security camera there?

A. Yes, I did.

Q. In the – did you know that there was a security camera relative to the parking lot? Did you know that?

A. Yes, I did.

Q. Were you aware – or were you aware one way or the other where any new – whether any new cameras were installed at or about that time?

A. No.

Q. And with regard to the cameras that had been there the whole time you were there, do you know – did you believe and do you believe that they were working that whole time?

A. Yes.

* * *

[Cross-Examination of Joan Maida]

[Page 11482]

Q. You were not aware of the SEC investigation, right?

A. No.

Q. You were not aware of any criminal investigation in the United States, correct?

A. I was aware of a criminal investigation.

Q. When were you aware of the criminal investigation?

A. I don't remember.

Q. Okay.

Give us an idea. Was it in 2003 or 2004, approximately?

A. It was probably 2004.

Q. So, in 2004, you were aware of a criminal investigation here in the United States; is that correct?

A. Probably.

Q. Okay.

How did you become informed of that?

A. I really don't know. It was general knowledge.

Q. Everybody knew; is that what you're saying?

A. Yes.

Q. Okay.

When you say "general knowledge," are you talking about the people in 10 Toronto Street?

A. Yes.

Q. So, the – if you say it was general knowledge, was that conversation that people would have at 10 Toronto Street?

[Page 11483]

MR. GENSON: Objection, your Honor. Objection.

THE COURT: Sustained.

BY MR. CRAMER:

Q. We can agree that it was – your words – general knowledge of the workers at 10 Toronto Street that there was a criminal investigation of Conrad Black here in the United States, correct?

MR. GENSON: Objection.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. That's what I said, yes.

* * *

[Page 11487]

* * *

Q. When you packed the four boxes –

A. Yes.

Q. – the four boxes – how did you decide what to pack?

A. I just took my files that were – that were – there.

[Page 11488]

Q. And are these files from your area or are these files from Mr. Black's area?

A. Mr. Black did not have an area.

Q. He had an office?

A. There were no files in his office.

Q. There were no files in his office?

A. No.

Q. So, everything was from your office?

A. Yes.

* * *

[Page 11496]

* * *

Q. Okay.

At one point you called Lance Bloomfield, right?

A. Yes, I called him.

Q. And you called him because you wanted help moving the boxes, right?

A. I asked him to move the boxes for me.

Q. And at this point, your car is still parked in your normal spot, right?

A. Yes.

Q. And if I may show you – we'll do that in a minute.

And Mr. Bloomfield came up, right?

[Page 11497]

A. Right.

Q. He came up with a hand cart; isn't that correct?

A. Yes.

Q. And you had him move 13 boxes; didn't you, Ms. Maida?

A. Yes.

Q. Not four that you packed, but 13, correct?

A. Yes.

Q. Who packed the other eight?

A. I probably did.

Q. Now, you said you packed four or five, Ms. Maida. Who packed –

A. They were already packed. They were already packed, those boxes.

Q. You're telling us you packed all of these boxes?

A. Probably.

Q. Not probably.

Do you know whether or not you packed all of these boxes?

A. All those boxes – all those boxes were not always in the office.

Q. Do you know who packed the other eight or nine boxes, Ms. Maida?

A. I probably did.

Q. You probably did, but you're –

A. Yes.

[Page 11498]

Q. – not sure?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 31, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME FORTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Redirect Examination of Joan Maida]

[Page 11564]

* * *

Q. Okay. Now, you said you pulled documents, files. Were there boxes of documents regarding Palm Beach, the houses, do you remember? Were there documents –

A. I believe so.

Q. Were there documents regarding Conrad's deceased brother's estate –

A. Yes.

Q. – and charity?

Were there documents of correspondence with a man named Cardinal Aloisius Ambrosia, do you remember that?

A. There was.

* * *

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 7, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FIFTY-TWO
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Cross-Examination of Daniel Rosenthal]

[Page 12500]

* * *

Q. Now, sir, you mentioned that you were no longer – that Williams & Connolly was no longer – representing Mr. Black in the SEC investigation, correct?

A. On what date?

Q. On May – as of April of 2005.

A. That's approximate, yeah.

[Page 12501]

Q. But Williams & Connolly continued to represent Mr. Black in the criminal investigation, right?

A. At that time, I don't recall.

Q. Well, sir, let's talk about some of the people involved.

Brendan Sullivan, he is a criminal lawyer, right?

A. And civil, as well.

Q. He's a criminal lawyer, correct, sir?

A. He's an attorney.

Q. Brendan Sullivan – tell us some of the cases that Mr. Sullivan is most famous for?

MR. GENSON: Objection, Judge.

THE COURT: What is the basis of your objection?

MR. GENSON: It's irrelevant.

I'd like a sidebar.

BY MR. SUSSMAN:

Q. Sir –

MR. SUSSMAN: Your Honor, I think I'm – this witness has testified Mr. Sullivan is just a normal, regular lawyer and not –

THE COURT: I do not think that is what he said.

MR. SUSSMAN: Well, let me rephrase the question.

THE COURT: Rephrase your question.

BY MR. SUSSMAN:

Q. Sir, are you familiar with an individual named Oliver North?

[Page 12502]

MR. GENSON: Objection, Judge. Objection.

THE COURT: Sustained. Sustained.

BY MR. SUSSMAN:

Q. So, you'd agree with me Mr. Craig does criminal work, as well, correct?

MR. GENSON: Your Honor, we'd like a sidebar.

THE COURT: We can have a sidebar.

* * *

[Page 12503]

(Proceedings had at sidebar:)

MR. GREENSPAN: 80 to 85 percent of Brendan Sullivan's –

MR. SUSSMAN: I am going to move on. So –

MR. GREENSPAN: Just a minute.

MR. SUSSMAN: – I will withdraw it.

MR. GREENSPAN: 80 to 85 percent of Brendan Sullivan's work is representing law firms that are sued. That's what it is.

Yes, he had Oliver North. Yes, he juniored to Edward Bennett Williams. But the bulk – the vast bulk – of his practice is administrative and civil defense.

* * *

[Page 12506]

* * *

THE COURT: I assume that what you were attempting to establish is that they received the subpoena; and, the fact that they brought –

MR. GENSON: They didn't receive.

THE COURT: – on somebody – or they knew of the subpoena – the fact that they brought on someone with criminal experience suggests that they knew there could be criminal implications.

MR. SUSSMAN: Exactly.

THE COURT: Which goes to the obstruction count.

Right, Ms. Ruder?

MS. RUDER: Yes.

THE COURT: All right.

* * *

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 11, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FIFTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Direct Examination of Laurent Wiesel]

[Page 12947]

* * *

Q. How many times did you go to 10 Toronto Street?

A. I – I believe – if I was there for a week, I would – I would – count that as one time. I would say four to six times.

Q. When was the first time you went to 10 Toronto Street?

A. On this – I believe that it was December 1st, 2003, for that entire week.

Q. You were there for an entire week?

A. Yes.

Q. And by that, you mean five business days or –

A. Monday through Friday, yes.

Q. What was your purpose of going to 10 Toronto Street on December 1st of 2003?

A. The purpose was to collect documents to respond to this November 18th, 2003, subpoena from the SEC.

Q. Did other lawyers from Sullivan & Cromwell accompany you to 10 Toronto Street on December 1st, 2003, and dates thereafter?

A. Yes. Other lawyers and clerical staff.

[Page 12948]

Q. When you went to 10 Toronto Street in December of 2003, what did you do?

A. I identified locations where responsive or relevant documents were likely to be. I directed my – the people with me to – and did this on my own, to – collect the files that we thought would – were reasonably likely to contain documents responsive to the SEC's request. We kept a log of such files. We sent them out for copying.

When the – in some cases, the copies came back to 10 Toronto Street. In some cases, we had the copies sent directly to our offices in New York. In any event, we replaced – the copy vendor would return

the originals of the documents to 10 Toronto Street, and we oversaw their return to the location where they were taken from.

Q. Was the copying done at 10 Toronto Street?

A. Some copying was done at 10 Toronto Street, but the majority was contracted to a copy vendor, a company that runs – that does copying for a living; and, they would come to 10 Toronto Street, take the documents that we identified, copy them and return them.

Q. Now, you mentioned that you went to 10 Toronto Street four or six times and a number of those times were to review and copy documents according to the subpoena, correct?

A. Yes, sir.

Q. On each occasion did you follow the same process you told **[Page 12949]** us about?

A. Yes.

Q. And each time you went to 10 Toronto Street to copy documents, were each of those occasions before May of 2005?

A. Yes, sir.

Q. Did you come to know an individual by the name of Joan Maida?

A. Joan Maida, yes.

Q. Joan Maida.

Who is Joan Maida?

A. Joan Maida was, and perhaps still is, Mr. Black's personal assistant.

Q. Were you granted access to paperwork, files, documents in Ms. Maida's office?

A. Yes.

Q. Were you granted access to paperwork, files and documents in Ms. Maida's office each time you went to 10 Toronto to copy documents?

A. Yes, sir.

Q. Were any limitations placed on what you could look at with respect to what was in Ms. Maida's office?

A. Not at all.

Q. Were any limitations placed on what you could copy with respect to what was in Ms. Maida's office?

A. No.

[Page 12950]

Q. What was your understanding of what types of documents were contained in Ms. Maida's office?

A. Well, the gamut of business records, correspondence; also, personal correspondence of Mr. Black's.

Q. So, these were not just Ms. Maida's documents. These were Mr. Black's documents?

A. Of, yes, the – the vast majority or if not all – I don't want to speculate about all of the documents, but the files kept in Ms. Maida's office were the files of – of – Mr. Black.

Q. Were you granted access to Mr. Black's office?

A. Yes.

Q. Can you tell us back in December of 2003 and those other occasions when you went there, what's the office look like?

A. It's a nice office. It had a desk, a couch, maybe an armchair, some books on the shelves, maybe some art, sculpture.

Q. Did it appear to be a storage room for documents?

A. No. At the time, it was – it was – clearly Mr. Black's office.

Q. And at the time you went there in December of 2003, was Mr. Black in and about his office?

A. That week, I do recall that he was in and about his office.

Q. And were you able to determine where his files, his papers **[Page 12951]** were kept for the most part?

A. Yes.

Q. Where?

A. To the best of my recollection, the files were kept for the most part in Joan Maida's office.

Q. Now, with respect to Mr. Black's office, on the occasions you went there to copy and review documents, were any limitations placed on what you could look at?

A. No.

Q. Were any limitations placed on what you could copy –

A. No.

Q. – in Mr. Black's office?

Did you also review, obtain and copy documents in other locations within 10 Toronto Street?

A. Yes.

Q. Now, sir, as you were collecting these documents in your capacity as an attorney, did you keep a log – a document log?

A. Yes. A document log of – a log of documents that we collected was maintained.

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[Page 12955]

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Q. Mr. Wiesel, the log, does it indicate – why don't you tell us what's shown in the log. You did tell us that, but let me ask you this: Does it indicate where documents were found within 10 Toronto?

A. Yes. The log indicates the room or the file cabinet where documents were found.

[Page 12956]

Q. And do you recall if the log indicates that documents were found in Joan Maida's file cabinets outside Lord Black's office?

A. Yes, it does.

Q. And do you recall approximately how many documents – or how many entries there are of documents found in Joan Maida's file cabinets?

A. I could only say several pages. I don't recall the number of entries.

Q. Does the log also contain indications of bank statements that were copied, collected and produced?

A. Yes, it does.

Q. Does the log also indicate Joan Maida's files that were copied, collected and produced?

A. Yes.

Q. Okay.

Did you organize these files in any fashion?

A. No. These files were organized by the people they belonged to. We simply identified files that we wanted to copy and logged – logged the names of the files and their locations.

* * *

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS	)	
Defendants.	)	Chicago, Illinois June 13, 2007 10:00 o'clock a.m.

VOLUME FIFTY-SIX
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Ruling on Lack of Unanimity of Theory Requirement for Mail Fraud]

[Page 13476]

* * *

THE COURT: . . .

I have reviewed Mr. Boultbee's Proposed Instruction 20 and the need for unanimity as to the particular false pretense, representation or promise. I am

sustaining the government's objection to that. I will not give that **[Page 13477]** instruction because I don't think it's an accurate statement of the law. For the following reasons, I am going to follow the pattern instruction:

I don't think it's – under the law, you do not need to have unanimity on what particular misrepresentations were made, as long as the jury is unanimous that the defendant engaged in a scheme to defraud. U.S. versus Lyons, the 7th – the 9th Circuit case I gave you the other day at 472 F.3d 1055, 1068 rejected this precise argument.

The 2nd Circuit has effectively reached the same decision in U.S. versus Shaoul, S-H-A-O-U-L, 41 F.3d 811 at 817. And although the 7th Circuit has not addressed this precise issue based on its cases regarding the unanimity requirement with respect to the scheme, such as U.S. versus Fawley F-A-W-L-E-Y, 137 F.3d 458 at 471, a 1998 case, and U.S. versus Davis, 471 F.3d 783 at 790, a 2006 case, I believe they would come out the same way.

Your reliance on U.S. versus Fawley, 130 – I'm sorry, I cited the wrong one. I am not relying on U.S. versus Fawley. You were relying on U.S. versus Fawley at 137 F.3d 458 at 471. I am relying on U.S. versus Davis.

Your reliance on Fawley, I believe, is misplaced. In Fawley, the 7th Circuit addressed the false – a false statement to the grand jury, an 18 U.S.C. section 1623 case. The unanimity issue there pertained to something that was an **[Page 13478]** element of the offense. Here the element of the offense is a scheme to defraud, and the instruction makes clear that they have to agree unanimously on that scheme.

For those reasons, I will not give your proposed unanimity instruction as to the particular false pretense, representation or promise.

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APPENDIX X

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 18, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FIFTY-EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Government Summation]

[Page 13631]

* * *

BY MS. RUDER:

Ladies and gentlemen, we are not here because somebody made a mistake. We are not here because somebody forgot to dot their i's or cross their t's.

We're not here because somebody was late on a disclosure or because somebody forgot to identify something as a related-party transaction. **[Page 13632]** We are here because five men – these four defendants (indicating), together with David Radler – systematically stole over $60 million from the shareholders of Hollinger International; and, because these same five men checked their fiduciary duty to the shareholders of the company at the doorstep.

Did they try and cover their tracks? You bet they did.

Did they try and leave behind a phoney paper trail that would make their actions appear legitimate, a cover story? That is exactly what they've done.

Ladies and gentlemen, it is time, and it will be your job, to expose this cover story for the lie that it is.

These men had a duty. They had a duty to be honest. They had a duty to be fair and loyal to the shareholders of Hollinger International. That means something. It means something, ladies and gentlemen. But the evidence has shown in this case that it did not mean anything to these defendants. Their duty was to each other. Their loyalty was to each other. Their loyalty was to the scheme.

Conrad Black fancied himself a proprietor. He could have a 747 if he wanted. No sackcloth and ashes for Conrad Black. It was his company and he could do with the company and its money as he pleased.

David Radler, Peter Atkinson, Jack Boultbee and Mark **[Page 13633]** Kipnis, they were part of his team. They went along with Mr. Black's approach to

the company because it benefitted them, because it enriched them.

And because the top four executives could not take all the money that they wanted from the company openly and honestly, they lied about it. They lied to the shareholders about the true reasons why over $60 million went not to the shareholders, but instead to the top four executives and to the company that Mr. Black controlled – Hollinger, Inc.

They stole money and property from Hollinger International. They robbed the shareholders of their right to honest services, to honest executives who were focused on doing their job loyally for the company. That is fraud.

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[Page 13638]

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So, we're going to start with mail and wire fraud. These are not the detailed instructions that you're going to get, but this is just a summary.

But there are three parts of it. First, we have to show you that there was, in fact, a scheme – a scheme to defraud. In this case, there were three: The U.S. non-compete scheme, the CanWest scheme, and the perks scheme.

We also have to show that this wasn't all a big mistake; these defendants did this knowingly; they had intent to defraud the company.

And we also have to show – because this is mail and wire fraud, we have to show – that the mails and wires were used as part of this. Wires are things like e-mails, faxes, and so on. So, we will cover this.

One thing I want to mention, though, before I get started with the scheme, part of the intent to defraud that we're talking about in this case is very common sense. The defendants stole money and property from the company. That's **[Page 13639]** one of the theories behind this fraud.

There's also a second theory, and we are alleging both. The second theory has to do with something called honest services. And I expect the Judge will instruct you that a corporation's officers – which includes all four of these defendants – as well as its directors and controlling shareholders – which also includes Mr. Black – owe a fiduciary duty of loyalty to the corporation and its public shareholders.

What does that mean? The duty of loyalty requires that the directors, officers and controlling shareholders act in the corporation's best interest; that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation. And I mention this to you right at the outset because it is a common thread that runs through what we're going to be talking about today.

Stealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case.

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[Page 13699]

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And, ladies and gentlemen, I told you at the beginning that this is partly about the theft of money. And it is, because this is stealing 9-and-a-half million

bucks. But there's the other part of it, too. That loyalty, that honest services that all five of these men owed to the company. Mr. Black owed it, Mr. Radler, Mr. Boultbee, Mr. Atkinson, and Mr. Kipnis. Every single one of them.

In this deal, they robbed the shareholders of that, too. Because Conrad Black and David Radler and Jack Boultbee and Peter Atkinson, they have an obligation to protect the company's money, to protect the assets. If the buyer wasn't requiring it, they had a duty to make sure that that money went to the shareholders.

Mark Kipnis had the same duty. And he knows as well as anyone – he is on the front lines talking to Mr. Reed and Mr. Henson. He knows they're not requiring this. He knows they're not requesting it. He knows $9-and-a-half million is nowhere in the contract. What is he doing when he takes out his pen and gets that money to the top four executives? That is a violation of his duty of loyalty. It is not honest services.

All of these defendants stole that. They stole the money and they stole the trust, the loyalty that these **[Page 13700]** shareholders had every right to expect.

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[Page 13705]

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And why would they? They're not finished. This is when we get to APC. It's not a deal. There's no conditions of closing to worry about. There's nothing that I can tell you about whether the buyer requested anything, because it wasn't a sale of news-

papers. This was, Mr. Cramer told you in opening statements, just a money grab. And that's right. It was just a money grab.

Here's what APC is about, ladies and gentlemen. David Radler, Conrad Black, Jack Boultbee and Peter Atkinson, they wanted some more money -- more of the company's money. And, so, they took it. And they had Mark Kipnis dummy-up **[Page 13706]** these non-compete contracts; sign them up with the company's own subsidiary, so that they could get the payments tax-free. They would have a paper trail so that they could take the payments tax-free. That's APC.

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[Page 13709]

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Now we're coming to the end of the thefts: April, 2001. It's hard to know which one is more blatant, frankly: This one (indicating) that we're about to talk about in Forum and Paxton, or the APC that we just looked at.

[Page 13710]

In April of 2001, we come back to the Forum and Paxton case. And, remember, when we talked about Forum and talked about Mr. Case, he told you will very specifically he did not request or require non-competes either from Hollinger, Inc., or from any of the executives.

And, as a matter of fact, the only non-compete that Mr. Case signed is with International and Inc. There were no Non-Compete Agreements with any of the top four executives in Forum. And there weren't

in Paxton, either. There were no non-competes with the individual executives. Nothing was signed.

As it turns out, that's because Mr. Kipnis messed up.

David Radler testified and explained to you that he had spoken with Mr. Kipnis about this before; and, just as in CNHI II, the plan was for Mr. Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson to be added to all the deals and for money to be set aside for them in all the deals.

But Mr. Kipnis told Mr. Radler that he forgot.

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[Page 13726]

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That's not what this case is about. It's not about the fact that money was paid to Mr. Atkinson. It's not about the dollar amounts. It's about why. Why was that money paid to Peter Atkinson. It says here that it was a condition to the transaction. That's not true.

And, listen, if defense counsel wants to parse out that language and say, "Well, it was technically a condition to the transaction because there was in the contract on page whatever a little subsection that says, 'Conditions of Closing.'"

And do you see Peter Atkinson's name right there (indicating)? Well, that's part of the cover story, too, ladies and gentlemen. That's the paper trail that they left behind to be able to argue something like this.

Because the truth of it is CanWest did require it to close the deal. And that's what matters. It's not

whether you can construct an argument later based on a contract. They had a duty of loyalty to refrain from doing things that would harm the shareholders' interests.

And because they had that duty of loyalty, this (indicating) doesn't fly, ladies and gentlemen. It does not fly. You can't make up an after-the-fact argument using lawyer terms like "condition of closing" and point to some paragraph and say, "well, see, it says right here, 'Condition **[Page 13727]** of Closing.'"

MR. SCHACHTER: Your Honor, objection. This is getting into legal conclusions. There is – the law is – Ms. Ruder is misstating the law. To suggest that the duty of loyalty requires anything in particular about this disclosure, that's incorrect.

THE COURT: Ladies and gentlemen, I will instruct you on the law that applies to this case after we have heard all of the closing arguments.

The Court's instructions on the law are mandatory for you to follow. So, you will hear the law from the Court at the end of the closings.

You may proceed.

BY MS. RUDER:

Yes.

And I do expect, ladies and gentlemen, the Judge will give you a specific instruction on what the duty of loyalty requires. And I am confident, when you hear that instruction, which does require Mr. Atkinson, along with the others, to refrain from taking actions that harm the shareholders' interests. That was part of this. Because Mr. Atkinson, just like the others, he had a duty to tell the truth. Not to parse

words, but to tell the truth about what this payment was for.

MR. SCHACHTER: Your Honor, objection. Instructions **[Page 13278]** about duty of loyalty should come from the Court, not from Ms. Ruder. Ms. Ruder is misstating the law.

THE COURT: Ladies and gentlemen, when I instruct you on the law at the end of the case, I will instruct you about the duty of loyalty. And that is the law that you must follow.

BY MS. RUDER:

The crime in this case is not about the fact that defendants got money. It's not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money.

The SEC disclosures in this case, that's why they're relevant. It's because when you look at those disclosures, you see the defendants hiding from the shareholders, lying to the shareholders about the true reasons why this money was getting paid to them – getting paid to the top four executives – instead of staying with the company. This is what it's about, ladies and gentlemen.

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[Page 13730]

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Forum and Paxton, again, it's easy. The disclosure says that these guys signed non-competes with the buyers. They didn't. That didn't happen here. This wasn't part of condition of closing those transactions.

So, the disclosure is completely false.

The disclosure is also false because it says, "The independent directors approved the terms of the payments." That's not true, either. The independent directors – in particular, the Audit Committee – wasn't told anything about the terms of the CNHI II, APC and Forum and Paxton payments. They testified – all three of them: Mr. Burt, Ms. Kravis and Governor Thompson – unequivocally, unequivocally, that they did not know about these payments and they didn't approve them.

And they are corroborated on the documents.

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[Page 13743]

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We also have to show intent to defraud. These things were done knowingly with the intent to deceive and cheat Hollinger International and its public shareholders.

And there are two parts of this. First, it's that theft of money and property causing a gain of money or property to the defendants or others, or the potential loss of money or property to another, or depriving the corporation of and its public shareholders of their right of the honest services of the corporate officers.

Intent to defraud can be either one or it can be both.

We are pursuing both theories, ladies and gentlemen. Both of them in this case.

With that, let's talk about Conrad Black.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 18, 2007
Defendants.	)	1:30 o'clock p.m.

VOLUME FIFTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE AND A JURY

* * *

[Government Summation]

[Page 13768]

David Radler got caught. He got caught in his lies. He pled guilty to the crime, the crime that he did. And he accepted responsibility and he came in and he testified to you about his role in these awful events.

It's not a flattering role, it's not an attractive role at all, but Mr. Radler came in and he told you about that. But, ladies and gentlemen, Mr. Radler didn't do this by himself. He didn't commit this crime alone. He did it with Mr. Black and with Mr. Boultbee and with Mr. Atkinson and with Mr. Kipnis.

It's not just David Radler's word, it's all the evidence, ladies and gentlemen. It's all of it together.

Now, because we're talking right now about knowledge and intent, we need to consider what evidence there has been in this case about Mr. Black's approach to the shareholders of the company because part of the crime is stealing the money, taking money and property from the corporation; but the other part of it is these honest services that we talked about, the duty of loyalty to the shareholders of the corporation.

And in the evidence that's been entered into in this case, the evidence you've seen in the case, there are plenty of things for you to look at to get a window into Mr. Black's mind and his heart when it comes to his duty of loyalty to the shareholders.

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[Page 13867]

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The last charge in the case is obstruction, and that is against Mr. Black alone.

November 2003 was a turning point for Conrad Black. Contrary to his musing of September 2002, he hadn't won the great war of the non-competes. People were coming down on him, and what Mr. Black was learning in November 2003 is that the SEC had opened an investigation. As time went on, he learned that a federal grand jury had been convened to investigate his conduct, and that there was a very real and growing possibility of criminal charges, the same criminal charges that we are discussing right here today in this courtroom.

Conrad Black knew that all these things were happening. Here's how he knew. First of all, the SEC proceeding. Government Exhibit Toronto 1 is a letter that was sent to Mr. Black by the SEC on November 18, 2003, through his counsel. It specifically informed Mr. Black and his counsel that the SEC was conducting an investigation concerning **[Page 13868]** Hollinger International, and they are asking Mr. Black to provide documents.

The document request that came as part of this letter specifically identified non-compete payments as part of what the SEC wanted. This is what they're looking at.

Now, Mr. Black didn't get a letter like this about the federal grand jury investigation, but he knew that was coming, too. And what you see, ladies and gentlemen, beginning in 2003 and continuing into 2004 and continuing into 2005 is that Mr. Black was building a specialized legal army. These were not real estate lawyers. They weren't divorce lawyers. They weren't –

MR. GENSON: Objection, Judge. I'd object to that. I'd like to have a sidebar. They're SEC lawyers. They're civil lawyers. They're representing him on litigation. To suggest that he knows there's a grand jury because he hires lawyers I think is improper.

MS. RUDER: That's what I was about to say, Judge.

THE COURT: Keep going.

MS. RUDER: What Mr. Black does know and what you heard in the testimony from some of these very lawyers is that these are some of the most experienced securities and criminal defense lawyers in

the country. Alex Bourelly took the stand in Mr. Black's case. He described his background to you. He was a former federal prosecutor.

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[Page 13872]

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A similar memo comes May 13, 2005. The rules are still in place. You can't just take this stuff. You've got to go through an inspector.

Now, Mr. Black's counsel has argued to you that, look, all of Mr. Black's documents had already been copied, had already been copied by his lawyers. They had big staffs of people from his law firms going in and copying everything at 10 Toronto Street. However, ladies and gentlemen, that doesn't matter.

Let me move forward to – let me move forward to Government Exhibit Toronto 18. On May 19, 2005, Mr. Black's counsel, Ms. Owens at Baker Botts, receives this notice from the SEC. This time they want more documents. They're asking Mr. Black for more information.

Now, did Ms. Owens immediately pick up the phone and call Conrad Black? She testified in this case. She told you she didn't, and there's no reason not to credit Ms. Owens's testimony.

But Ms. Owens was far from Conrad Black's only lawyer. He had lots of them, ladies and gentlemen, and it defies reason to believe that the SEC is knocking on Mr. Black's door. He's got this specialized army of SEC and criminal lawyers, and nobody told him that the SEC was coming back for more?

[Page 13873]

Use your common sense. But even if, even if somehow this information did not make its way to Conrad Black, it doesn't matter because he still knows that this SEC proceeding is ongoing. He still knows that he's facing criminal charges. Remember, everybody knows that.

And that's when we get to May 20th, 2005. And on that day, we see something truly startling because Conrad Black, knowing that all this is going on, he enters 10 Toronto Street and with the help of his assistant, Ms. Maida, and his chauffeur, he removes 13 boxes of documents. He removes them from the building.

Now, you heard the testimony. Ms. Maida had already tried to get those boxes out earlier in the day, and she had been stopped. She was prevented from taking them out. The inspector said no.

This isn't eviction day either. This isn't May 31st. There's still 11 days left. And once the inspectors say no and the documents are required to stay put within 10 Toronto Street, you'd think there would be no rush. There's 11 more days. Let the inspectors come back on Tuesday after the holiday and take a look.

But that's not what happens. Ms. Maida tells Mr. Black what's happened, and he is irritated. He comes down, and he takes the boxes. And what is it that Mr. Black is doing?

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[Page 13879]

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Okay. This – this brings us full circle, and what I've described to you today is the case that you've heard for three months. For the rest of this week, you're going to hear from defense counsel, counsel for each of the defendants in this case. Ladies and gentlemen, keep your eye on the ball.

Keep your eye on the crime – no, I need that, thank you – keep your eye on the crime. The crime here is the defendants' lies to the shareholders about why over $60 million went to Inc. and to the top four executives and not to the company. Okay. The crime here – I blame Mr. Sussman – the crime in this case is about why. This is what I have been talking to you about all day.

Why did the shareholders receive $60 million less than they were supposed to? In the CNHI II transaction, what about that nine-and-a-half-million dollars? What possible basis was there for that to go to Mr. Black, Radler, Boultbee and Atkinson? The buyer didn't require it, ladies and gentlemen. There's no legitimate reason.

When they're asked about it, they lie about it. And the same pattern, the same thing is true on all these other **[Page 13880]** transactions. It's about stealing money, ladies and gentlemen. And this, this honest services, acting in the corporation's best interests, refraining from taking actions that either conflict with the corporation's interests or that harm the corporation, that meant nothing to them. Nothing.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 26, 2007
Defendants.	)	1:50 o'clock p.m.

VOLUME SIXTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE AND A JURY

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[Government Rebuttal Summation]

[Page 14947]

And Conrad Black knows this, too, and that's why what he tells the board and the Audit Committee in the May 2001 memo and the shareholders at the shareholders meetings are lies. But why is this fraud they ask you? It's a fair question. They say, well, why is it fraud?

Well, the answer, of course, is it's Hollinger International's money. It's the shareholders' money, and it's a violation of honest services. Ms. Ruder told you that two of the key points or what I would call two of the key points, but you'll have the judge's in-

structions, are that these individuals act in the corporation's best interests, that they not do something that conflicts with the corporation's interests or to harm the corporation.

[Page 14948]

What do I mean by that? You know, you'll have the judge's instructions but let me give you my reading of it, but you follow the judge's. It means these men had a duty of loyal to act in the company's, the shareholders', best interests. I'm going to suggest to you – there, I said it, we've all said I suggest to you – I'm going to suggest to you that means putting the shareholders' interest number one, okay? Shareholders' interests number one.

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[Page 14972]

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Okay. So here's what an honest officer and director does when the company's share prices are doing really well and they feel like they deserve a bonus. What they do is they go to the board of directors or they go to the Audit Committee or they go to the Compensation Committee and they show them that chart. And they say, you know what? I've done great things for this company, and I believe that I deserve a raise. And **[Page 14973]** if the board of directors and the Audit Committee or whatever course they take approves it, then it gets disclosed in the proxy circular, if they're one of the top five executives at least, and the shareholders get a chance to see it.

And once the shareholders get a chance to see it, if the shareholders don't like it, they can raise ques-

tions about that pay at the shareholder meeting, and they can sa Mr. Executive, why did you give yourself that humongous bonus of $1.9 million in 2000 and 2001? Why did you do that? And then they can tell the shareholders the truth, that they believed they deserved a bonus for all that they have done for the company and the great deals that they have done for the company.

You know, that's what an honest business person does. That's what an honest member, an officer, a director of a public company does. But that's not what happened in this case. When these men were questioned about the money they took, they didn't seek approval. They just lied to the shareholders.

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[Page 14997]

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So how, how would we be able to prove that Conrad Black actually received this document if it's in a box that's spirited away from 10 Toronto Street? If it's not found in that box, how are we going to prove that he received it?

You know, Mr. Black's counsel tells you that Mr. Black just got angry and he took the documents, but he never tells you why. Counsel tells you that Mr. Black never knew about the SEC document request that was communicated to his lawyers the day before.

Well, it is quite a coincidence, though, isn't it, that the day before this document request is communicated to Mr. Black's counsel, the next day Mr. Black absolutely positively has to get those documents out. But you know what? It doesn't matter.

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[Page 15007]

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There's nothing wrong with legitimate tax planning. There is nothing wrong, ladies and gentlemen, we agree, and if there's – if non-competes are entered into and they're taxable in Canada or not taxable in Canada, it doesn't matter a wit to this case.

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[Page 15016]

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It doesn't make sense and it is fraud if these men on their own, without talking to the board of directors, without advising the shareholders, decide they're going to move $12 million up to Hollinger, Inc. Why? Because they want to. That's the only reason. Because it benefits Mr. Black's **[Page 15017]** control of Hollinger, Inc.

If that's the only reason they're doing it and the contracts say otherwise, that is a lie. It's fraud. That's the fraud in this case. That's why it's the why that's important.

Excuse me. That's why it's significant that Hollinger, Inc. did not – was not required by the buyers and that there is no justification for that money going up to – away from the shareholders of Hollinger, Inc. – excuse me – of Hollinger International and to the shareholders of Hollinger, Inc. That's the crime. That's the fraud, what's wrong with the non-competes.

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[Page 15019]

* * *

You know, not only did they know it – well, so that's – that's the fraud. That's the fallacy of this whole Inc. non-compete thing. This is nothing more than a way to move money from one company to another. And don't let them tell you that, oh, well, it's just one – it's all just one big happy family, one's a parent, one's a child. You know, they have – each – these officers have fiduciary responsibilities to each company, and there's – you'll read your Honor's – her Honor's instructions about the fiduciary obligation, but there is no exception there, well, if you're on another board, you can breach your fiduciary duties.

No. These are Hollinger International's assets that are being sold. They owe their duty to Hollinger International. So when I put on here honest services and duty of loyalty, that's what I'm talking about. That's the fraud in this case. The shareholders of Hollinger International are getting defrauded out of that $16.5 million because the buyers never wanted this stuff.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	June 27, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME SIXTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Government Rebuttal Summation]

[Page 15061]

We left off yesterday talking about Mr. Atkinson an his $2 million lottery ticket – his $2 million tax-free bonus from CanWest. And Mr. Atkinson's counsel wants to tell you, "Well, he was open, he was honest about his receipt of this bonus money in the CanWest transaction."

But, ladies and gentlemen, you have heard the evidence and you know that Mr. Atkinson was not open and honest about the receipt of this money as bonus money.

He was not open and honest with the Audit Committee and Board of Directors; and, he most certainly was not open and honest with the shareholders.

* * *

[Page 15071]

You know, are ladies and gentlemen, you'll read the Judge's instructions and you'll see that there is a scheme to deprive the shareholders of honest services of the executives. And you'll see what that means is to take money from the shareholders or the company, or to gain money from the shareholders of the company, by means of fraud and deception. Okay? You will see that in the jury instructions.

* * *

[Page 15082]

* * *

Well, let's just take a look at the information they got in front of the shareholders. I won't read it to you, but let's just do – let's see how would we have had to – how would these guys have had to make this disclosure (indicating) accurate? Is it just nit-picking? Let's look.

Well, we'd have to add in here (indicating) that in 2000 – "Well, these weren't all in connection with the sale of newspapers in 2000 because – and in the case of the APC payments – the decision of Messrs. Black, Radler, Boultbee and Atkinson to pay themselves bonuses in the form of Non-Compete Agreements," they would have to add that in there, right, because otherwise the shareholders are told, "This was a non-compete for APC in connection with the sale of a **[Page 15083]** newspaper in 2000."

It wasn't a closing – to satisfy a closing condition. It was that Messrs. Black, Radler, Boultbee and Atkinson inserted themselves into the agreement that were not required by the buyer.

I mean, that's the true and accurate disclosure here.

They entered into Non-Competition Agreements with the purchasers, although in Forum and Paxton agreements, there were no individual Non-Compete Agreements. $6.1 million was really the amount that was paid in 2001 with those APC checks, although the checks were back-dated to 2000. Let's be honest with the shareholders.

Now, the amount in 2000 is actually – it goes down a little bit. It's 9.5 million.

Is that right? No.

And, then, it says the company's independent directors were never presented with and never approved.

* * *

[Page 15084]

* * *

The pattern is set. They tell you, "None of us lied to anyone." Why? Because everyone single lie in this case you've seen has gotten passed around like a hot potato. Peter Atkinson didn't write the September, 2000, memo, it's Mark Kipnis' and David Radler's fault.

Well, Kipnis says he didn't – Kipnis' lawyer says he didn't – know, he relied on David Radler.

And Peter Atkinson didn't write the May memo, it's Beth DeMerchant's fault. She wrote the May memo. She provided all the information.

Conrad Black's counsel tells you the same thing.

Peter Atkinson wasn't talking at the shareholders' meeting, so he didn't lie, 0to make any misrepresentations to the shareholders.

You know, what? All of these men knew that the information that was being provided to the shareholders was a lie.

And you won't see "lie" defined in the jury instructions. You're going to have to use your common sense on that. You'll see "honest services."

* * *

[Page 15095]

* * *

Finally, materiality. Ladies and gentlemen, it mattered to the Audit Committee and the shareholders why the executives received millions in non-compete payments. You heard the evidence.

What did Ms. Kravis tell you? "Why did you approve getting non-compete money out of CanWest sale?

"We were told it was a requirement of the buyer.

[Page 15096]

"Did that matter to you?

"Yes.

"Well, even in the context of a multi-billion dollar deal and, as an Audit Committee member, was it important to you whether 2 million from the deal went

to Mr. Atkinson as opposed to Hollinger International?

"Yes.

"Was it important to you whether the $2 million from the deal went to Mr. Boultbee as opposed to Hollinger International?

"Yes.

"Why was it important to you, even in such a large transaction – large dollar deal?

"Because it's still the $2 million belongs to the shareholders."

They want to tell you that, "Hey, even if we had come in and told the Audit Committee about these non-compete payments, they still would have approved them." Okay.

Full and accurate disclosure. Again, let's remember, if they're going to come in and tell the Audit Committee full and accurate disclosure about the U.S. Community non-competes, what are they going to tell the Audit Committee?

Here's what they would have to tell the Audit Committee, and you make the decision whether this Audit Committee or any Audit Committee would ever have given the **[Page 15097]** okay.

They would have to come in and they would say, "Look, here's the thing. We're working our way – we're selling off all these newspapers. We have made the company a lot of money over the past decade or so. But we're kind of working our way out of a job. You know, we're newspaper guys and we believe we should get a share of what the company has made.

"But – but – you see, there's this new thing in Canada called 'non-competes' where they're tax-free. So, Audit Committee, here's what we'd like to do. What we'd like to do is pay ourselves a portion of the sales proceeds, but we'd like to call them 'non-competes.'

"Let us fill you in on what that's going to require. We are going to have to sign some false documentation at the closings that say that the buyers required them, even though they weren't required.

"Well, why do we have to do that?

"Well, because we're also going to have to file some false disclosures. We're going to have to tell the shareholders that they were required by the buyers as a condition of closing because, you know, the shareholders are not going to like these as is; but, if they find out that we're just paying ourselves these huge bonuses, they're really going to be upset.

"Oh, and one other thing. So that we can get this **[Page 15098]** significant tax treatment for ourselves – these tax-free bonuses for ourselves – there's this little catch for the company. The company is also going to have to file false tax returns with the IRS. Okay? Because in order for us to say that these are legitimate non-competes, we're going to – we can't take this – the company can't report this money in as income that's then later paid out as executive salaries with bonuses. It's got to report it as if they're real Non-Compete Agreements. Okay? Because that's got to stay consistent with the theme.

"So, Audit Committee, if you're okay with paying us these bonuses so we can get the tax-free treatment, and you're okay with the filing of the false tax returns, the lies that we may have to make to a few

auditors, to a few lawyers and more than a few shareholders, then that's what we propose to do."

That would be the full and accurate disclosure in this case. That is what you should be evaluating, in terms of whether it would matter to the audit committee.

* * *

[Page 15143]

* * *

Honestly, when you go back to the jury room, ladies and gentlemen, I have one request. When you consider the transactions in this case, think of those two words. Think of "honest services." And ask yourself, when you consider each transaction, whether that is what the shareholders received. Because, you know, when you buy a share of stock in a public company, there are very few guarantees. The stock could go up. You could lose your shirt.

But one of the things you should be able to rely upon is the honest services of your officers and directors; the fact that they would be loyal to your interests as a shareholder.

When you evaluate the transactions in this case, ladies and gentlemen, and you just look at those two simple words, you're going to see that that's not what the **[Page 15144]** shareholders in this case received.

* * *

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 27, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME SIXTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Colloquy Regarding Closing Arguments]

[Page 15055]

* * *

MR. SUSSMAN: I do not plan on making an argument that there was any obligation under U.S. securities law to disclose this. I plan to argue the fact

that Mr. Atkinson was not open and honest about the fact that these were bonus payments.

MR. SCHACHTER: Well, then, I think that's part and parcel of the same thing. And perhaps to cure it, the Court **[Page 15056]** could instruct the jury at that moment or Mr. Sussman can say it.

Now, the securities laws don't require this disclosure, but he didn't cause this disclosure to be made even though the law doesn't require it.

But the jury needs to be told that it's not – that there's no obligation to disclose this as bonus money.

MR. SUSSMAN: Your Honor, your Honor will instruct the jury that there is no securities fraud in this case. I don't think there will be anything confusing about the context in which I raise this.

MR. SCHACHTER: That's a very different thing because it suggests to the jury that there was an obligation to have disclosed this, when there was none; and, absent – I mean, if Mr. Sussman would just say – we're not saying that there was a legal obligation to disclose it, but – then that would be okay.

But, beyond that, I really think we're – throughout this trial I think we've been kind of skating the edge of an issue because they're not charged with false securities filings. And I think that these kinds of arguments really does push us over that edge.

MR. SUSSMAN: I think your Honor has ruled, though, that the false disclosures and the omissions, which are part of the pretenses, your Honor said –

[Page 15057]

THE COURT: Right.

MR. SUSSMAN: – that those are a critical part of the fraud in this case.

So, while we are not saying it's securities fraud, it absolutely is part of the honest services fraud in this case.

MR. SCHACHTER: But there's only an omission if there's a duty to speak. And the securities laws are what decides whether or not there is a duty to speak. And there is no duty to speak.

THE COURT: I am not going to strike the slide based on what I am hearing.

If you have an objection when he makes the argument, you can certainly stand up and make it.

* * *

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 27, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME SIXTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * *

[Jury Instructions]

[Page 15166]

* * *

All of the defendants are charged with mail fraud in Counts 1, 5, 6, 7 and 9, and with wire fraud in Count 8.

Defendant Kipnis is charged individually with mail fraud in Count 2 and wire fraud in Counts 3 and 4. Defendant Black – defendants Black and Boultbee are charged with wire fraud in Counts 10, 11 and 12.

To sustain each charge of mail or wire fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or [**Page 15167**] participated in a scheme to defraud or to obtain money or property by means of materially false pretenses, representations or promises, as described in the Information.

Second, that the defendant did so knowingly and with the intent to defraud.

And, third, that for the purpose of carrying out the scheme or attempting to do so, the defendants in the mail fraud counts used or caused the use of the United States mails or a private or commercial interstate carrier in the manner charged in the particular count; and, that the defendants in the wire fraud counts caused the use of an interstate wire communication in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular defendant and a particular count, then you should find that defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt as to a particular defendant and a particular count, then you should find that defendant not guilty of that count.

The Information charges defendants with committing mail and wire fraud in two different ways.

First, defendants are charged with mail and wire **[Page 15168]** fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations or promises.

Second, defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders.

A scheme is a plan or course of action formed with the intent to accomplish a particular purpose. A scheme to defraud is a scheme that is intended to deceive or cheat a person or entity and to obtain money or property and caused the potential loss of money or property to a person or an entity; or, to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger International.

In order to deprive Hollinger International and its public shareholders of their intangible right to defendants' honest services, the government must prove that the particular defendant you are considering misused his position for private gain for himself and/or a co-schemer.

Private gain does not include job security or compensation in the regular course of employment through above-board channels.

[Page 15169]

In considering whether a defendant has engaged in a scheme to defraud another of a right to the defendant's honest services, you must first find that the defendant owed that other person or entity a fiduciary duty.

Honest services include those fiduciary duties owed under Delaware law by an officer, director or controlling shareholder to a corporation and its public shareholders.

A controlling shareholder is an entity or individual shareholder who directly or indirectly either owns a majority interest in the corporation or who exercises control over the business affairs of the corporation.

Under Delaware law, a corporation's officers, directors and controlling shareholders owe a fiduciary duty of loyalty to the corporation and its public shareholders.

The duty of loyalty requires that the directors, officers and controlling shareholders of a corporation act in the corporation's best interests; and, that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation.

Before you can find that a defendant has deprived Hollinger International and its public shareholders of his honest services, you must find that the defendant knowingly and intentionally breached his duty of loyalty.

If the transaction at issue is entirely fair to the corporation, then the government has not proven a breach of **[Page 15170]** the duty of loyalty.

In considering whether a particular transaction is entirely fair to the corporation, you should consider two basic aspects: Fair dealing and fair price.

Fair dealing requires a fair process. Fair dealing considers whether the transaction was timed – I'm sorry, fair dealing considers when the transaction was timed – how it was initiated, structured and negotiated; whether or how the transaction was disclosed to the directors; and, whether or how the approvals of the directors were obtained.

Fair price requires that the transaction was substantively fair by examining the economic and financial considerations of it. You must consider both aspects of entire fairness.

If the material facts concerning a director's, officer's or controlling shareholder's interest in a particular transaction were disclosed to or known by the independent directors on the Board of Directors or the Audit Committee when the Board or committee approved or ratified the transaction, or the transaction was entirely fair to the corporation and its public shareholders, then that director, officer or controlling shareholder has not breached his duty of loyalty to the corporation.

A Board of Directors or Audit Committee can ratify a prior unauthorized transaction. Ratification has the same **[Page 15171]** effect as approval. In order for such ratification to be valid, the Board of Directors or Audit Committee must have acted on complete disclosure of the material facts and circumstances surrounding the transaction. A subsequent ratification relates back to the transaction as of the date when the transaction occurred.

Materiality is an element of the offense of mail and wire fraud. A misrepresentation or omission is material if it has a natural tendency to influence or is capable of influencing the decision of the decision-making body to which it was addressed.

A breach of fiduciary duty owed by an officer, director or controlling shareholder under Delaware law does not, in and of itself, amount to a violation of the mail or wire fraud statute. That is to say, even if you find beyond a reasonable doubt that an officer, director or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt.

You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud.

[Page 15172]

The phrase "intent to defraud" means that the acts charged were done knowingly, with the intent to deceive or cheat Hollinger International and its public shareholders, in order to cause a gain of money or property to the defendants or others; and the potential loss of money or property to another; or, to deprive the corporation and its shareholders of their right to the honest services of their corporate officers.

Good faith on the part of a defendant is inconsistent with an intent to defraud, an essential element of the charge. The burden is not on the defendant to prove his good faith. Rather, the government must

prove beyond a reasonable doubt that the defendant acted with intent to defraud.

The mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrued to his co-schemers, as long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

A defendant's association with his alleged co-schemers or persons alleged to be members of an enterprise is not, by itself, sufficient to prove his participation or **[Page 15173]** membership in a scheme or enterprise.

If a defendant performed acts that advanced or assisted a criminal activity, but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish a defendant's guilt.

As to the mail fraud counts, the government must prove that the United States mails or a private or commercial interstate carrier were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails or a private or commercial interstate carrier, a defendant need not actually intend that use to take place. You must find that the defendant knew this would actually occur; or, that the defendant knew that it would occur in the ordinary course

of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the interstate – that the carrier was an interstate carrier.

The defendant need not actually or personally use the mail or interstate carrier.

Although an item mailed or sent by interstate carrier need not, by itself, contain a fraudulent representation or promise or request for money, it must further or attempt to **[Page 15174]** further the scheme. Each separate use of the mail or an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

As to the wire fraud counts, the government must prove that interstate communication facilities were used to carry out the scheme or were incidental to an essential part of the scheme. In order to cause interstate wire communications to take place, a defendant need not actually intend that use to take place.

You must find that the defendant knew this use would actually occur; or, that the defendant knew that it would occur in the ordinary course of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the wire communication was of an interstate nature.

The defendant need not actually or personally use the interstate communication facilities. Although an item communicated interstate need not, by itself, contain a fraudulent representation or

promise or request for money, it must further or attempt to further the scheme.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

[Page 15175]

The following types of transactions constitute transmissions by means of wire communication in interstate commerce within the meaning of the wire fraud statute: E-mails, faxes, filing of public documents by wire and electronic money transfers.

This instruction applies to your consideration of Counts 10 and 11: Regulations in effect between 2000 and 2002 regarding disclosures in proxy statements filed with the SEC from 2000 to 2002 require disclosures of perquisites or other personal benefits, securities or properties not categorized as salary or bonus.

Unless the aggregate amount of the perquisite, personal benefit, securities or properties is less than the lesser of either $50,000 or 10 percent of the total of annual salary and bonus reported for the named executive officer.

For purposes of disclosures in a proxy statement, perquisites and other personal benefits are valued on the basis of the aggregate incremental cost to the reporting corporation and its subsidiaries during the one-year period. This means that the value of a perquisite or other personal benefit is computed solely on the basis of the actual additional cost to the corporation.

This instruction relates to your consideration of counts 10 and 11: A fact or omission is material if

there is a substantial likelihood that a reasonable investor would **[Page 15176]** consider the fact or omission significant or important in deciding whether to buy, sell or hold securities.

In other words, there must be a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.

Instructions regarding concealing documents from an official proceeding for Count 13.

Defendant Black is charged individually with concealing documents from an official proceeding in Count 13. To sustain the charge of concealing documents from an official proceeding, as charged in Count 13 of the Information, the government must prove the following propositions:

First, on or about May 20th, 2005, the defendant corruptly concealed or attempted to conceal records, documents or other objects; and, second, the defendant did so with the intent to impair the availability of the records, documents or other objects in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 13.

If, on the other hand, you find from your consideration of all the evidence that anyone of these propositions has not been proved beyond a reasonable doubt, **[Page 15177]** then you should find defendant Black not guilty of Count 13.

The term "corruptly" means having an improper purpose; an intent to subvert or undermine the fact-

finding ability of an official proceeding is an improper purpose.

The term "official proceeding" includes a proceeding before a judge or court of the United States; a proceeding before a federal grand jury; or, a proceeding before a federal government agency, which is authorized by law.

The United States Securities and Exchange commission – the SEC – is a federal government agency which is authorized by law.

Neither an investigation by the United States Attorney's office nor any Canadian court proceeding, nor any internal corporate document retention policy constitutes an official proceeding.

An official proceeding need not be pending or about to be instituted at the time of the offense. An official proceeding, however, must have been reasonably foreseeable to the defendant.

The government bears the burden of proving beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant.

There are three official proceedings identified in Count 13: One, an SEC proceeding against defendant Black; two, a criminal investigation of defendant Black by a federal **[Page 15178]** grand jury; and, three, a pending criminal proceeding against defendant Black before the United States District Court.

To find defendant Black guilty of Count 13, the government does not need to prove beyond a reasonable doubt that Black intended to impair the availability of the records, documents or other objects in all three official proceedings.

Instead, the government must prove beyond a reasonable doubt that defendant Black intended to impair the availability of the records, documents or other objects in at least one of those official proceedings.

However, you must unanimously agree on which of the official proceedings, if any, Black intended to obstruct.

Instructions regarding racketeering for Count 14.

Defendant Black is charged individually with racketeering in Count 14. To prove defendant Black guilty of racketeering as charged in Count 14, the government must prove the following propositions:

First, that there was an association in fact enterprise, the Hollinger enterprise, comprised of Conrad Black, David Radler, John Boultbee, Peter Atkinson, Mark Kipnis and the Ravelston Group, Inc.

Second, that defendant Black was associated with the Hollinger enterprise.

Third, that defendant Black knowingly conducted or participated in the conduct of the affairs of the Hollinger **[Page 15179]** enterprise through a pattern of racketeering activity as described in Count 14.

Fourth, that the activities of the Hollinger enterprise affected interstate commerce.

And, fifth, that the commission of at least one of the racketeering acts described in Count 14 occurred on or after November 17th, 2000.

If you find from your consideration of all the evidence that each of these propositions has been

proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 14.

If, on the other hand, you find from your consideration from all the evidence anyone of these propositions has not been proved beyond a reasonable doubt, then you should find defendant Black not guilty of Count 14.

In order to find a pattern of racketeering activity for purposes of Count 14, you must find beyond a reasonable doubt that defendant Black committed or caused another person to commit at least two racketeering acts described in Count 14; and, that those acts were in some way related to each other; and, that there was continuity between them and that they were separate acts.

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed by itself may not be enough for you to find that a [**Page 15180**] pattern exists.

Acts are related to each other if they are not isolated events; that is, if they have the same – if they have similar purposes or results or participants or victims or are committed a similar way or have other similar distinguishing characteristics or are part of the affairs of the same enterprise.

There is continuity between acts if, for example, they are ongoing over a substantial period; or, they are part of the regular way some entity does business or conducts its affairs. The government need not prove that all of the acts described in Count 14 were committed, but you must unanimously agree as to which two or more racketeering acts defendant Black committed or caused to be committed, in order to find defendant guilty of that count.

The term "enterprise" can include a group of people or legal entities associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an enterprise, you should consider whether it has an ongoing organization or structure; either formal or informal; and, whether the various members of the group functioned as a continuing unit.

A group may continue to be an enterprise even if it changes membership by gaining or losing members over time.

* * *

[Page 15187]

* * *

When the word "knowingly" or the phrase "the defendant knew" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident.

Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.

You may infer knowledge from the combination of suspicion and deliberate indifference to the truth. If you find the defendant had a strong suspicion that criminal **[Page 15188]** conduct was occurring, yet intentionally shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. You may not conclude that a defendant had knowledge if he was merely negligent in not discovering the truth.

* * *

APPENDIX AA

Hollinger

F. David Radler
President and Chief
Operating Officer

Telephone: (604) 732-4443
Fax: (604) 732-5564

DATE: August 1, 2000

TO: Conrad M. Black
Jack Boultbee
Peter Atkinson
Jerry Strader
Mark Kipnis

FROM: F. David Radler

RE: American Community Newspapers

We have completed the sale of the American Community Newspapers.

- Michigan was purchased by the Paxton Group for $59 M
- Forum Publications bought North Dakota for $14 MM

- Community Newspapers Holdings Inc. purchased the balance (excluding Monmouth) for $98.2 MM

We have an offer for Monmouth at $2 MM that we are trying to increase. Including Monmouth at the $2 MM level, we sold the group at $173.2 MM. When Bradford is added at $38 MM and Hawaii at $3.1 MM, the division went for $214.3 MM plus working capital.

1999 EBITDA plus management fees totaled $16,939,000 which gives us 12.4 X's pre-management fee (excluding Hawaii) and a likely 13.4 X's post-management fee.

Unfortunately, the two major purchasers have asked for a 5-year non-compete from Conrad and me covering not only the states wherein they purchased assets but those states that border the said states. This would leave us only Alaska, Wyoming and Louisiana for us to continue our activities. I have, therefore, allocated 42.6% of the purchase price to our joint non-compete. I have been assured there is suitable accommodation four our new headquarters in Casper, Wyoming.

/s/

Hollinger, Inc., 1827 West 5th Avenue, Vancouver, British Columbia V6J 1P5

Govt Exh. CNHI 25

APPENDIX BB

Hollinger International Inc.

Mark S. Kipnis
Vice President, Corporate Counsel
and Secretary

MEMORANDUM

TO: Marie-Josée Kravis
Hon. Richard R. Burt
Hon. James R. Thompson, Chairman

FROM: Mark S. Kipnis

DATE: September 1, 2000

RE: CanWest Transaction Related Party Aspects

I. NONCOMPETITION AGREEMENTS

Conrad M. Black, F. David Radler, Hollinger International, Ravelston, Peter Atkinson and Jack Boultbee have each been requested to execute noncompetition agreements. The agreements effectively exclude them from any new Canadian newspaper acquisition. The total portion of the purchase price allocated to the noncompetition agreements is Cdn$50 million, approximately 1.4% of the Cdn$3.5 billion purchase price (allocated Cdn$19 million each to Messrs. Black and Radler, Cdn$4 million

each to Hollinger and Ravelston, and Cdn$2 million each to Messrs. Atkinson and Boultbee). We are currently selling U.S. community newspapers to CNHI, Paxton and Forum. Each transaction requires a noncompete agreement and the amounts allocated to the noncompetes are approximately 3.2%, 3.4% and 2.9% of the respective purchase prices. Immediate prior transactions where noncompetition agreements were entered into and approved were the large CNHI transaction and the American Trucker transaction, wherein noncompete agreements were allocated 11.5% and 2.5% of the respective purchase prices.

II. RAVELSTON MANAGEMENT AGREEMENT BREAK-UP FEE

Ravelston has a longterm management agreement in place with Hollinger. The CanWest purchase price is based upon EBITDA. During the negotiations, Ravelston agreed to reduce its ongoing management fee by approximately Cdn$11 million. The purchase price was accordingly upward adjusted by approximately Cdn$110 million. In consideration for Ravelston reducing its management fee and consenting to CanWest having an early termination of its management arrangements, it is proposed that Ravelston receive a purchase price allocation of Cdn$30 million, approximately 0.9% of the purchase price.

MSK/ae

APPENDIX CC

HOLLINGER INTERNATIONAL INC.
HOLLINGER INTERNATIONAL PUBLISHING INC.
JOINT BOARD OF DIRECTORS MEETING
DECEMBER 4, 2000

MEETING MINUTES

A joint regular meeting of the Board of Directors (the "Board") of Hollinger International Inc. (the "Company") and Hollinger. International Publishing Inc. ("Publishing") was held Monday, December 4, 2000, at the offices of the Company, 712 Fifth Avenue, 18th Floor, New York, New York. Board members present were Dwayne O. Andreas (via telephone), Barbara Amiel Black, Conrad M. Black, Richard R. Burt, Raymond G. Chambers (via telephone), Daniel W. Colson, Henry A. Kissinger, Marie-Josée Kravis (via telephone), Shmuel Meitar, Richard N. Perle, F. David Radler, Robert S. Strauss (via telephone), A. Alfred Taubman, James R. Thompson and Lord Weidenfeld. Leslie H.. Wexner was absent. Peter Y. Atkinson, J.A. Boultbee, Paul B. Healy, Mark S. Kipnis, Linda Loye and Robert Smith were present at the invitation of the Chairman. The meeting was called to order at 11:00 a.m. Eastern time. Mr. Black acted as Chairman of the meeting and Mr. Kipnis acted as Secretary.

Matters discussed and considered in connection with the Company were as follows:

I. REPORT ON OPERATIONS – ACQUISITIONS, DISPOSITIONS AND INVESTMENTS

Mr. Black commenced the meeting with a brief summary of the concluded CanWest disposition. CanWest is receiving very solid assets. The transaction is an evolutionary change for the Company. We now have minimal debt other than our public notes, and a myriad of options, including new acquisition possibilities and repurchasing shares in the open market. We will continue to divest our remaining Canadian papers. The *Telegraph* has had its best year ever. The *National Post*'s circulation is 90 percent of the *Globe and Mail* and growing. The *National Post* has had a huge impact on Canada. We expect the *National Post* to virtually break even in the fourth quarter of this year and have a reduced budgeted loss of $6 million in 2001. A discussion ensued.

Mr. Colson reported on U.K. operations. We were one of at least five bidders for the Express Group of newspapers. We were a strategic bidder as we did not want the *Daily Mail* to own both the middle market newspapers in the U.K. The winning bidder has a very questionable business reputation and is principally a publisher of pornographic magazines. We are co-owners of the London printing plant with Express; the recent sale triggers our right to buy the other 50 percent. We expect difficulties in exercising our right to purchase the Express' 50 percent as the formula in the joint venture agreement for establishing the purchase price does not deal clearly with the question of assets acquired by the joint venture company since the

joint venture was established. Meanwhile, the Express Group has already missed a large payment in connection with a joint venture we also have with the Express Group for newsprint buying. The Telegraph is on track for its best year ever. 2000 will be the first year we achieve an EBITDA of US$100 million. EBITDA for the first 10 months is £62 million, approximately 42 percent above budget. Advertising revenue has increased approximately £25 million this year to £215 million. We are maintaining our circulation lead of 300,000 over *The Times* during the week and 400,000 on Saturdays. Sunday circulation is still 400,000 behind *The Sunday Times*. Circulation revenue is on budget. Mr. Colson believes being in the eighth year of a cover price war will make it difficult to contemplate a cover price increase, but management is proposing one on Saturdays because of our strong market position. During the past year or two, *The Times* started a subscription program similar to The Telegraph's and now has approximately 100,000 subscribers compared to our 300,000. However, they appear to have largely cannibalized their own circulation as their overall circulation has not increased. The *Electronic Telegraph* currently has 25.5 million hits per month. Handbag.com, our joint venture with Boots, now has 5 million hits per month from 350,000 users. It is the leading women's portal in the U.K. We still have approximately a 30 percent stake in Interactive Investors. Its current market cap is approximately $75 million. Mr. Colson believes III has a fundamental problem with its business model. It has great traffic but insufficient revenue generation capabilities. *The Spectator's* latest ABC cir-

culation of 59,800 is an all-time high, notwithstanding a reduction in bulk sales. There are now more than 33,000 subscribers. We are expecting an operating profit of £880,000, an increase of 48 percent. A discussion ensued.

Mr. Radler reported on U.S. operations. During the month of December, the Chicago Group will complete the acquisition of the Copley Group of newspapers known as the Fox Valley Press. We are buying papers generating $86 million in sales and $3.5 million of EBITDA. We believe we can dramatically increase EBITDA. The papers consist of four dailies, one tri-weekly and 11 weeklies. When combined with our current Chicago Group papers, we will have total circulation of 1.975 million in the greater Chicago metropolitan area. The new Sun-Times plant has five of its six presses operational. We are actually building the presses ourselves. A seventh press will probably be needed. Costs relating to overtime, excessive staff, waste and additional equipment costs are being addressed; however, a major continuing cost arises from the presses' current inability to zone advertising. We will probably not be able to effectively zone until the end of March. National advertising is up 18 percent. Retail is down 3.5 percent and classified down 1 percent. Mr. Radler further noted that the Canadian sale has "clawback" provisions on both sides based upon meeting 2000 targeted earnings. Our 2000 EBITDA requirement is approximately $398 million. Through October we are approximately $300,000 above budget. A discussion ensued.

II. REPORT ON FINANCE

Mr. Boultbee reviewed third quarter results and the effect of the CanWest transaction. Third quarter revenue was up 3.7 percent ($18.3 million). Third quarter-EBITDA was up 42 percent ($20.6 million). The *National Post* has shown significant improvement, with revenue up 31 percent and EBITDA up 34 percent, all versus third quarter 1999. Interest expense was up 21.1 percent. Mr. Boultbee next analyzed earnings from comparable operations and showed the impact from internet activities. Mr. Boultbee next reviewed the financial aspects of the CanWest transaction, as originally signed on July 30, 2000 and as amended on November 8, 2000. The amendment did not change any valuations, but certain properties were removed from the sale. Funds were used primarily to pay bank debt. The residual cash after estimated expenses of sale is approximately $90 million. All future sales of Canadian properties should fall to residual cash. A discussion ensued.

III. ADOPTION OF RESOLUTIONS

The following resolutions attached hereto in their entirety as Exhibit A were presented by Mr. Black to the Board for its consideration: (i) approval and adoption of the minutes of the September 11, 2000 Board meeting; (ii) approval of the following dividends: declaration of a March 1, 2001 dividend of $2.577 per each share of the Company's Series C Convertible Preferred Stock; declaration of a January 15, 2001 dividend of approximately $0.96 per each share of the Company's Series E Convertible Preferred Stock; and declaration of a January 15, 2001 dividend of

$0.1375 per each share of the Company's Common Stock (both Class A and Class B); (iii) confirmation and ratification of actions taken by the Executive Committee since the last Board meeting; and (iv) general authorization for implementation of the foregoing resolutions.

The Board reviewed the resolutions attached hereto as Exhibit A, and upon motion duly made and seconded, the resolutions were unanimously approved and adopted by the Board.

It was ordered that a copy of Exhibit A be attached to the minutes of the meeting and signed by the Secretary for identification.

IV. MISCELLANEOUS

A general discussion ensued. The next meeting of the Board of Directors is tentatively scheduled for Tuesday, February 27, 2001. Notice of the actual meeting date will be forwarded to all Board members.

There being no further business brought before the Board, the meeting was formally adjourned at 12:35 p.m. Eastern time.

/s/ Mark S. Kipnis
Mark S. Kipnis
Secretary of the Meeting

SIGNED BY THE SECRETARY
FOR IDENTIFICATION

/s/_____

EXHIBIT A

HOLLINGER INTERNATIONAL INC.

Joint Board of Directors Meeting
December 4, 2000

ADOPTED RESOLUTIONS

1. APPROVAL OF MINUTES OF THE SEPTEMBER 11, 2000 BOARD MEETING.

WHEREAS, at the meeting of the Board of Directors held on September 11, 2000, pursuant to the Chairman's request, the Vice President of the Company, Mark S. Kipnis, acted as Secretary of the meeting;

WHEREAS, the Secretary of the meeting caused to be prepared formal minutes of the meeting, copies of which have been distributed to the members of the Board of Directors;

WHEREAS, the Board of Directors has reviewed these minutes and believes that the minutes accurately reflect the September 11, 2000 Board meeting;

NOW, THEREFORE, BE IT RESOLVED, that the minutes of the September 11, 2000 board meeting are hereby formally approved and adopted by the Board of Directors and shall be signed by the Secretary of the meeting for identification and inserted into the Company's minute book.

2. DECLARATION OF DIVIDENDS.

Declaration of Dividend on Series C Preferred Stock

WHEREAS, pursuant to the Certificate of Designation of the Company's Series C Convertible Preferred Stock (the "Series C Preferred Stock"), the Company is authorized to pay dividends cumulative from the date of issuance of the Series C Preferred Stock at the rate of 9.50% per annum of the stated Liquidation Amount per share (equivalent to $10.30845 per annum) in arrears on the first day of March, June, September and December;

WHEREAS, the Board of Directors desires to declare a $2.577 per share cash dividend on each of the issued and outstanding shares of Series C Preferred Stock of the Company payable on March 1, 2001, to stockholders of record on February 25, 2001.

NOW, THEREFORE, BE IT RESOLVED, that a $2.577 per share cash dividend on each of the Company's issued and outstanding shares of Series C Preferred Stock, payable on March 1, 2001 to stockholders of record on February 25, 2001, is hereby declared.

Declaration of Dividend on Series E Preferred Stock

WHEREAS, pursuant to the Certificate of Designation of the Company's Series E Convertible Preferred Stock (the "Series E Preferred Stock"), the Company is authorized to pay dividends cumulative from the date of issuance of the Series E Preferred Stock in arrears on the fifteenth day of January, April, July and October.

WHEREAS, the Board of Directors desires to declare a cash dividend of approximately $0.96 (to be calculated pursuant to the formula set forth in the Certificate of Designation) on each of the issued and outstanding shares of Series E Preferred Stock of the Company payable on January 15, 2001 to stockholders of record on January 1, 2001.

NOW, THEREFORE, BE IT RESOLVED, that a cash dividend of approximately $0.96 (to be calculated pursuant to the formula set forth in the Certificate of Designation) on each of the Company's issued and outstanding shares of Series E Preferred Stock, payable on January 15, 2001 to stockholders of record on January 1, 2001, is hereby declared.

Declaration of Dividend on Common Stock

WHEREAS, pursuant to Section C, Paragraph (2) of Article IV of the Company's Certificate of Incorporation and in accordance with the General Corporation Law of the State of Delaware, the Board of Directors may declare payment of a dividend on the common stock of the Company.

WHEREAS, the Board of Directors of the Company desires to declare a dividend of $0.1375 per each issued and outstanding share of the Company's Common Stock (both Class A and Class B shares) payable on January 15, 2001 to stockholders of record on January 1, 2001;

WHEREAS, after due analysis, the Board of Directors has concluded that the payment of said dividend is permitted under the Delaware General Corporation Law and the contractual obligations to which the Company is subject, if any;

NOW, THEREFORE; BE IT RESOLVED, that a dividend of $0.1375 per each issued and outstanding share of the Company's Common Stock (both Class A and Class B shares), payable January 15, 2001 to stockholders of record on January 1, 2001, is hereby declared.

3. CONFIRMATION AND RATIFICATION OF ACTIONS TAKEN BY THE EXECUTIVE COMMITTEE.

WHEREAS, on September 1, 1997, in order to enhance corporate flexibility and assist in corporate governance between scheduled board meetings, the Board of Directors expanded the authority granted to the Executive Committee to the full extent permitted by the Delaware General Corporation Law;

WHEREAS, in order to facilitate the transaction of business by the Company, the Executive Committee took certain authorized actions in the interim time period since the last hoard meeting;

NOW, THEREFORE, BE IT RESOLVED, that the actions taken by the Executive Committee via unanimous written consent as summarized below, of which full and complete originals have been inserted into the Company's minute book, and which are incorporated herein by this reference, are confirmed and ratified as of such date, with the same force and effect as if such actions and resolutions were taken or adopted by the Board of Directors:

(a) September 15, 2000. Authorization and approval of sale of certain assets to Newspaper Holdings, Inc.

(b) September 18, 2000. Authorization and approval of sale of certain assets to Paxton Media Group.

(c) September 19, 2000. Authorization and approval of sale of certain assets to Forum Communications.

(d) October 16, 2000. Authorization and approval of acquisition of certain assets of The Copley Press, Inc.

(e) October 25, 2000. Authorization and approval of $4,000,000 contribution of capital to Publishing.

4. GENERAL.

RESOLVED, that the appropriate officers of the Company be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments, certificates or documents, in the name and on behalf of the Company, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

Govt. Exh. Board 1D

APPENDIX DD

UNANIMOUS WRITTEN CONSENT OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. DATED AS OF SEPTEMBER 18, 2000

In conformity with Section 141(f) of the General Corporation Laws of the State of Delaware and the By-laws of Hollinger International Inc., a Delaware corporation ("International"), the undersigned, being all of the members of the Executive Committee of the Board of Directors of International (the "Executive Committee"), hereby consent to and adopt the following resolutions and take the following actions via this Unanimous Written Consent:

1. **APPROVAL OF DISPOSITION OF US COMMUNITY GROUP ASSETS**

   Sale of Publications to Paxton Media Group, Inc.

   RESOLVED, that the resolutions set forth on Exhibit A, attached hereto, are hereby approved and adopted and incorporated herein in their entirety.

2. **EXECUTION IN COUNTERPART**

   RESOLVED, that this Unanimous Written Consent may be signed via facsimile signature and in various counterparts which together shall constitute one and the same original instrument.

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Executive Committee of the Board of Directors of International, have executed this Consent as of the date first above written.

/s/ _____
Conrad M. Black

/s/ _____
F. David Radler

/s/ _____
Richard N. Perle

being all of the Members of the Executive Committee of International

EXHIBIT A

2. **APPROVAL OF DISPOSITION OF CERTAIN ASSETS TO PAXTON MEDIA GROUP**

WHEREAS, International's Board of Directors has approved the disposition by Company of substantially all of the assets and real property of certain of its indirect wholly owned subsidiaries relating to the publications set forth on Schedule 1, attached hereto to Paxton Media Group, Inc. ("Paxton"), and the execution by International of a 3-year mutually acceptable noncompete agreement by International and certain executive officers of International be approved in exchange for an aggregate purchase price of approximately Ninety-Eight Million Two Hundred Thousand Dollars ($98,200,000) ("Paxton Transaction").

NOW, THEREFORE, BE IT RESOLVED, that the Paxton Transaction is hereby approved and authorized.

RESOLVED, that the proper officers of International are hereby authorized and directed to take all such actions, including, without limitation, to negotiate, arrange for and enter into, all terms, conditions, agreements, instruments, certificates, documents or financing arrangements, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate the Paxton Transaction, including, but not limited to, an asset purchase agreement, a noncompete agreement, deeds, assignments; and bills of sales .

2. **GENERAL.**

RESOLVED, that the appropriate officers of International be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments, certificates or documents, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

APPENDIX EE

UNANIMOUS WRITTEN CONSENT OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. DATED AS OF SEPTEMBER 19, 2000

In conformity with Section 141(f) of the General Corporation Laws of the State of Delaware and the By-laws of Hollinger International Inc., a Delaware corporation ("International"), the undersigned, being all of the members of the Executive Committee of the Board of Directors of International (the "Executive Committee"), hereby consent to and adopt the following resolutions and take the following actions via this Unanimous Written Consent:

1. **APPROVAL OF DISPOSITION OF US COMMUNITY GROUP ASSETS**

   Sale of Publications to Forum Communications Inc.

   RESOLVED, that the resolutions set forth on Exhibit A, attached hereto, are hereby approved and adopted and incorporated herein in their entirety.

2. **EXECUTION IN COUNTERPART**

   RESOLVED, that this Unanimous Written Consent may be signed via facsimile signature and in various counterparts which together shall constitute one and the same original instrument.

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Executive Committee of the Board of Directors of International, have executed this Consent as of the date first above written.

/s/_____
Conrad M. Black

/s/_____
F. David Radler

/s/_____
Richard N. Perle

being all of the Members of the Executive Committee of International

EXHIBIT A

2. **APPROVAL OF DISPOSITION OF CERTAIN ASSETS TO FORUM COMMUNICATIONS COMPANY**

WHEREAS, International's Board of Directors has approved the disposition by Company of substantially all of the assets and real property of certain of its indirect wholly owned subsidiaries relating to the publications set forth on Schedule 1, attached hereto to Forum Communications Company ("Forum"), and the execution by International of a 3-year mutually acceptable noncompete agreement by International and certain executive officers of International be approved in exchange for an aggregate purchase price of approximately $14,000,000.00 plus or minus the Initial Net Working Capital Determination ("Forum Transaction").

NOW, THEREFORE, BE IT RESOLVED, that the Forum Transaction is hereby approved and authorized.

RESOLVED, that the proper officers of International are hereby authorized and directed to take all such actions, including, without limitation, to negotiate, arrange for and enter into, all terms, conditions, agreements, instruments, certificates, documents or financing arrangements, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate the Forum Transaction, including, but not limited to, an asset purchase agreement, a noncompete agreement, deeds, assignments, and bills of sales.

2. GENERAL.

RESOLVED, that the appropriate officers of International be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments, certificates or documents, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

APPENDIX FF

Govt. Exh. Filing 9F

2001 Annual Report for Hollinger International
April 1, 2002

* * *

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Related Party Transactions

Net amounts due from related companies at December 31, 2001 totalled $32.2 million and included a $36.8 million loan to a subsidiary of Hollinger Inc., net of amounts payable in respect of management and administrative expenses billed by Hollinger Inc. and corporate affiliates of Hollinger Inc. Hollinger Inc. and its affiliates billed the Company for allocable expense amounting to $34.3 million, $41.0 million and $38.2 million for 2001, 2000 and 1999, respectively (principally including management fees that were approved by the audit committee). On July 11, 2000, the Company loaned $36.8 million to a subsidiary of Hollinger Inc. in connection with the cash purchase by Hollinger Inc. of HCPH Special shares. The loan is payable on demand and to December 31, 2001, interest was payable at the rate of 13% per annum. Effective January 1, 2002, the interest rate was adjusted to LIBOR plus 3% per annum.

Lord Black indirectly has voting control of the Company. During each of 2001, 2000 and 1999 remuneration paid directly by the Company and its subsidiaries to Lord Black was $817,000, $2,477,000 and $640,000, respectively.

In two separate transactions in July and November, 2001, the Company and Hollinger L.P. completed the sale of most of its remaining Canadian newspapers to Osprey for total sale proceeds of approximately Cdn. $255 million ($166 million) plus closing adjustments primarily for working capital. The former Chief Executive Officer of Hollinger L.P. is a minority shareholder of Osprey. The Company's independent directors have approved the terms of these transactions.

In connection with the two above sales of Canadian newspaper properties to Osprey, to satisfy a closing condition, the Company, Hollinger Inc., and Lord Black and three senior executives entered into non-competition agreements with Osprey pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian businesses sold to Osprey for a five-year period, subject to certain limited exceptions, for aggregate consideration of Cdn. $7.9 million ($5.1 million). Such consideration was paid to Lord Black and the three senior executives and has been approved by the Company's independent directors.

On November 16, 2000, the Company and its affiliates, Southam and Hollinger L.P. ("Hollinger Group") completed the sale of most of its Canadian newspapers and related assets to CanWest. The aggregate sale price of these properties at fair value was approximately Cdn. $2.8 billion ($1.8 billion), plus closing adjustments for working capital at Au-

gust 31, 2000 and cash flow and interest for the period September 1 to November 16, 2000 which in total at December 31, 2000 approximated an additional $40.7 million.

In connection with the sale to CanWest, Ravelston, a holding company controlled by Lord Black through which most of his interest in the company is ultimately controlled, entered into a management services agreement with CanWest and National Post pursuant to which it agreed to continue to provide management services to the Canadian businesses sold to CanWest in consideration for an annual fee of Cdn. $6 million ($4 million) payable by CanWest. In addition, CanWest will be obligated to pay Ravelston a termination fee of Cdn. $45 million, in the event that CanWest chooses to terminate the management services agreement or Cdn. $22.5 million, in the event that Ravelston chooses to terminate the agreement (which cannot occur before December 31, 2002). Also, as required by CanWest as a condition to the transaction, the Company, Ravelston, Hollinger Inc., Lord Black and three senior executives entered into non-competition agreements with CanWest pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian business sold to CanWest for a five-year period, subject to certain limited exceptions, for aggregate consideration of Cdn. $80 million ($53 million) paid by CanWest in addition to the purchase price referred to above of which Cdn. $38 million ($25.2 million) was paid to Ravelston and Cdn. $42 million ($27.8 million) was paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

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During 2000, the Company sold most of its remaining U.S. community newspaper properties, for total proceeds of approximately $215 million. In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, the Company, Lord Black and three senior executives entered into non-competition agreements with the purchasers to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 of $0.6 million. These amounts were in addition to the aggregate consideration paid in respect of these non-competition agreements in 2000 of $15 million. Such amounts were paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

Included in the above sale, the Company sold four U.S. Community Newspapers for an aggregate consideration of $38 million to Bradford Publishing Company, a company formed by a former U.S. Community Group executive and in which some of the Company's directors are shareholders. The terms of this transaction were approved by the independent directors of the Company.

During 1999, the Company sold to Horizon Publications Inc. 33 U.S. community newspapers for $43.7 million. During 2001, the Company transferred two publications to Horizon Publications Inc. in exchange for net working capital. Horizon Publications Inc. is managed by former Community Group executives and controlled by certain members of the Board of Directors of the Company. The terms of

these transactions were approved by the independent directors of the Company.

The Company issued to Hollinger Inc. in connection with the 1995 Reorganization in which the Company acquired Hollinger Inc.'s interest in The Telegraph and Southam, 739,500 shares of Series A Preferred Stock. The Series A Preferred Stock was subsequently exchanged for Series D Preferred Stock. During 1998, 408,551 shares of Series D Preferred Stock were converted into 2,795,165 shares of Class A Common Stock. In February 1999, 196,823 shares of Series D Preferred Stock were redeemed for cash of $19.4 million. In May 1999, the remaining 134,126 shares of Series D Preferred Stock were converted into 134,126 shares of Series E Preferred Stock. In September 2001, 40,920 shares of Series E Preferred Stock were redeemed for cash of $3.8 million. The shares of Series E Preferred Stock are redeemable in whole or in part, at any time and from time to time, subject to restrictions in the Company's credit facilities, by the Company or by a holder of such shares.

Pursuant to a January 1997 transaction wherein the Company acquired Canadian publishing assets from Hollinger Inc., the Company issued 829,409 shares of Series C Preferred Stock. The stated value of each share was $108.51. On June 1, 2001, the Company converted all the Series C Preferred Stock at the conversion ratio of 8.503 shares of Class A Common Stock per share of Series C Preferred Stock into 7,052,464 shares of Class A Common Stock. On September 5, 2001, the Company purchased for cancellation, from Hollinger Inc., the 7,052,464 shares of Class A Common Stock for a total cost of

$92.2 million or $13.07 per share which represented 98% of the September 5, 2001 closing price.

* * *

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SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this 10-K to be signed on its behalf by the undersigned, thereunto duly authorized.

HOLLINGER
INTERNATIONAL INC.
(Registrant)

By: /s/ CONRAD M. BLACK

Lord Black of Crossharbour,
PC(C), OC, KCSG,
Chairman and Chief Executive
Officer

Date: March 28, 2002

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities on the dates indicated.

Signature	Title	Date
/s/ CONRAD M. BLACK Conrad M. Black	Chairman, Chief Executive Officer and Director (Principal Executive Officer)	March 28, 2002
/s/ JOHN A BOULTBEE John A Boultbee	Executive Vice President (Principal Financial Officer)	March 28, 2002
/s/ FREDERICK A. CREASEY Frederick A. Creasey	Group Corporate Controller (Principal Accounting Officer)	March 28, 2002
/s/ F. DAVID RADLER F. David Radler	Deputy Chairman, President, Chief Operating Officer and Director	March 28, 2002

/s/ DANIEL W. COLSON Daniel W. Colson	Vice Chairman and Director	March 28, 2002
/s/ BARBARA AMIEL BLACK Barbara Amiel Black	Vice President – Editorial and Director	March 28, 2002
/s/ DWAYNE O. ANDREAS Dwayne O. Andreas	Director	March 28, 2002
/s/ RICHARD R. BURT Richard R. Burt	Director	March 28, 2002
/s/ Raymond G. Chambers	Director	March 28, 2002
/s/ HENRY A. KISSINGER Henry A. Kissinger	Director	March 28, 2002
/s/ MARIE-JOSEE KRAVIS Marie-Josee Kravis	Director	March 28, 2002

[45] Signature	Title	Date
/s/ Shmuel Meitar	Director	March 28, 2002
/s/ RICHARD N. PERLE Richard N. Perle	Director	March 28, 2002
/s/ ROBERT S. STRAUSS Robert S. Strauss	Director	March 28, 2002
/s/ A. Alfred Taubman	Director	March 28, 2002
/s/ JAMES R. THOMPSON James R. Thompson	Director	March 28, 2002
/s/ Lord Weidenfeld	Director	March 28, 2002
/s/ LESLIE H. WEXNER Leslie H. Wexner		

APPENDIX GG

Hollinger

TELEPHONE: (416) 363-8721
FAX: (416) 364-0832

The Ravelston Corporation limited
10 Toronto Street
Toronto, Ontario
M5C 2B7

Attention: The Lord Black of Crossharbour
Chief Executive

Dear Lord Black:

Re: Premises and Operations at 10 Toronto Street, Toronto

As you know, the premises at 10 Toronto Street are owned by 10 Toronto Street Inc., an indirect wholly-owned subsidiary of Hollinger Inc. No lease or license exists for the occupation of premises therein by The Ravelston Corporation Limited, any of its affiliates (other than Hollinger Inc. and its subsidiaries), its shareholders or its officers and directors (except Peter White who is an officer and director of Hollinger Inc.). Likewise, various equipment, systems and benefit plans, as well as staff, are shared in one manner or another between Hollinger Inc. and Ravelston and its related parties.

This letter will serve as formal notice that Hollinger Inc. and 10 Toronto Street Inc. will require that Rav-

elston and its related parties (other than Hollinger and its subsidiaries and Mr. White) vacate the premises at 10 Toronto Street on of before May 31, 2005. We realize that this will require us to rationalize staff between the groups and to develop a plan for disentangling various services and benefit plans, not the lest of which will be the computer systems. We anticipate forming a working group to produce an equitable and non-intrusive plan for achieving this objective.

Yours very truly,

HOLLINGER INC.

/s/ Gordon W. Walker
April 13, 2005

Gordon W. Walker
Chairman of the Board

cc Peter G. White

HOLLINGER INC., 40 TORONTO STREET,
TORONTO, CANADA MSC 237

NOT ADMISSIBLE as to Boultbee,
Atkinson, or Kipnis

HOLLINGER INC.

Resolution of the Independent Committee

WHEREAS:

A. the premises at 10 Toronto Street are owned by 10 Toronto Street Inc., an indirect wholly-owned subsidiary of Hollinger Inc. (the "Corporation");

B. no lease or license exists for the occupation of premises therein by The Ravelston Corporation Limited ("Ravelston"), any of its affiliates (other than Hollinger Inc. and its subsidiaries), its shareholders or its officers and directors (except Peter White who is an officer and director of Hollinger Inc.); and

C. various equipment, systems and benefit plans, as well as staff, are shared in one manner or another between the Corporation and Ravelston and its related parties.

NOW THEREFORE, be it resolved that:

1. formal notice be given to Ravelston that the Corporation and 10 Toronto Street Inc. require that Ravelston and its related parties (other than the Corporation and its subsidiaries and Peter G. White) vacate the premises at 10 Toronto Street on of before May 31, 2005; and

2. in order to rationalize staff between the Corporation and Ravelston and to develop a plan for disentangling various services and benefit plans, the Corporation form a working group with Ravelston to produce an equitable and non-intrusive plan for achieving this objective.

PASSED at Toronto on April 13, 2005

/s/
Paul A. Carroll

/s/
Robert Metcalfe

/s/
Donald M.J. Vale

/s/
Allan Wakefield

/s/
Gordon W. Walker

PGW sent to:

Copy:

Mark Comely
Alan Mark
Ian Ness
Tony Reyes
Derek Tay
Jack Boultbee
Harry Burkman
Avi Greenspoon
David Wingfield
Jinn Badenhauaen.

Govt. Exh. Eviction Letter 1

APPENDIX HH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 05 CR 727
v.	)	
CONRAD M. BLACK, et al.	)	Hon. Amy J. St. Eve.

STIPULATION

It is hereby STIPULATED and AGREED by and between the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and defendant CONRAD M. BLACK, individually and through his attorney, EDWARD M. GENSON as follows:

1. On or about November 18, 2003, the Staff of the Division of Enforcement of the United States Securities and Exchange Commission (the "SEC") advised counsel for BLACK in writing that the SEC was conducting an investigation regarding International. Additionally, on or about November 18, 2003, the SEC served counsel for BLACK with the first of several subpoenas for documents requesting:

> "Any and all documents relating to the payment of fees, including management and noncompete fees, from Hollinger to or for the benefit of any personnel of Hollinger or its affiliates, including,

but not limited to, Conrad Black, David Radler, Mark Kipnis, Peter Atkinson, Jack Boultbee and to or for the benefit of any entities, including, but not limited to, Ravelston Corp., Horizon Publications, Inc. and Bradford." (Govt. Exhibit Toronto 1)

BLACK's counsel provided documents to the SEC in response to the November 18, 2003 subpoena. BLACK's counsel also provided documents in response to SEC subpoenas from December 12, 2003, February 19, 2004, March 3, 2004 and June 29, 2004. In total BLACK produced over 112,000 pages of documents to the SEC.

2. On or about August 27, 2004, the SEC notified BLACK in writing that it intended to recommend a civil injunctive action against BLACK relating to, among other things, "the transfer of Hollinger International, Inc. assets including, but not limited to, purported non-competition payments and sales of newspapers."

3. On or about November 15, 2004, the SEC filed a Complaint for Permanent Injunction and Other Equitable Relief against CONRAD BLACK and others (the "SEC proceeding"). The SEC's Complaint alleged that BLACK obtained money from International "through a series of related-party transactions" involving, among other things:

a. the CanWest non-compete payments;

b. the U.S. Community non-compete payments; and

c. the sale of newspaper assets from Hollinger International to Horizon.

An amended complaint was filed on March 10, 2005. Both complaints were served on BLACK's attorneys.

4. On or about March 21, 2005, the United States Attorney's Office for the Northern District of Illinois (the "government") filed a motion to intervene, for a limited, temporary stay of discovery in the SEC proceeding. In the motion, which was served on BLACK's counsel, the government declared:

> The United States Attorney's Office for the Northern District of Illinois [] is conducting a criminal investigation of Black, Radler, Hollinger, Inc. (collectively, 'the SEC defendants') and others relating to their conduct as to Hollinger International. The criminal investigation seeks to determine whether the SEC defendants and others fraudulently diverted corporate assets and opportunities owned by Hollinger International to themselves and to companies that they controlled. The transactions under investigation include various purported 'non-competition payments' that were made to Black, Radler, Hollinger, Inc. and others in connection with Hollinger International's sale of newspaper publications to third parties. The criminal investigation also seeks to determine whether fraud occurred in connection with Hollinger International's sale of newspaper publications to companies controlled by Black and Radler, as well as other transactions between Hollinger International and the SEC defendants and their companies. In connection with each of these related party transactions, the criminal investigation seeks to determine whether the transaction was appropriately disclosed to Hollinger International's independent directors, in Hollinger International's SEC

filings, and during Hollinger International's shareholder meetings.

The government further advised:

The government's criminal investigation seeks to determine whether the SEC defendants and others have violated various federal criminal statutes . . . .

5. On or about April 20, 2005, the government's motion to intervene in the SEC Proceeding was granted.

6. As part of the SEC proceeding, on or about March 29, 2005, the SEC served its "First Request for Production of Documents" to Inc. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." The SEC's March 29, 2005 document request was served on counsel for BLACK, and others. Counsel for Inc. complied with the March 29, 2005 Request for Production and provided documents to the SEC.

7. On or about May 19, 2005, Kathryn Pyszka, Senior Trial Counsel for the SEC advised Jennifer Owens, counsel for BLACK, via telephone that the SEC would be issuing an official request for documents from Mr. Black "shortly" as part of the SEC Action.

8. Later in the day on May 19, 2005, Kathryn Pyszka from the SEC sent a letter to Jennifer Owens via facsimile confirming their telephone conversation from earlier that same day. In this letter, Ms. Pyszka confirmed that the SEC would be serving an official request for documents on BLACK "shortly." Ms. Pyszka's letter also provided Ms. Owens with a document entitled "SEC Image and Data Delivery

Standards" describing the specific format to be used for producing BLACK's documents to the SEC. Government Exhibit Toronto 18 is a copy of the letter sent by Ms. Pyszka on May 19, 2005.

9. As part of the SEC proceeding, on or about May 20, 2005, the SEC provided its "First Request for Production of Documents" to counsel for BLACK, by sending, via Federal Express, a written request to BLACK through his counsel. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint."

10. On or about March 27, 2001, Hollinger International's proxy statement for 2001 was filed with the SEC by wire from Chicago, Illinois, to Washington, D.C.

11. On or about April 4, 2002, Hollinger International's proxy statement for 2002 was filed with the SEC by wire from Chicago, Illinois, to Washington, D.C.

SO STIPULATED

PATRICK J. FITZGERALD
UNITED STATES ATTORNEY

By: _____ Date: _____
ERIC H. SUSSMAN
Assistant United States
Attorney

/s/ Edward M. Genson Date: 6/1/07
EDWARD M. GENSON
Attorney for Defendant
CONRAD M. BLACK

/s/ Conrad M. Black Date: 6/1/07
CONRAD M. BLACK
Defendant

APPENDIX II

IN THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Case No.
vs.	:	07-4080, 08-1030
CONRAD M. BLACK,	:	08-1072, 08-1106
Defendant.	:	

Chicago Illinois

* * *

PROCEEDINGS

JUDGE POSNER: Good morning ladies and gentlemen. Our case, for argument, United States versus Black. Mr. Estrada?

MR. ESTRADA: Thank you, Judge Posner. And, may it please the Court. Everything that matters in this case has changed since 2008. The error is now conceded or at least indisputable. The burden is on the government. And, this is not a sufficiency of the evidence case.

The government, today, must confront the entire record, not merely parts of the record it likes. It must deal with David Radler. It must deal with the

text of the charging instrument, the information, that went to the jury.

It must deal with the jury instructions most of all. And, importantly, it must also deal with the acquittals. It is our submission today that none of the fraud or obstruction convictions can survive the panel reexamination.

Now, let me say, quickly, on the fraud. It is important to keep in mind that the government expressly argued to the District Judge for the theory of honest services, as a basis for letting the case go to the jury in the first place. That's record at 717. There is a quotation that we have in our reply on the Rule 54, at footnote 3, page 10.

The government, after the jury came back, on the exact same basis, once again, argued to the District Court, and this is at record 904, pages 9 to 10, that the jury could have found the defendant guilty, even if it believed the money was there, as based on the honest services theory.

Now, the government, in its briefing, changed its tack somewhat, when they were last before you, but you, yourselves, may recall that Judge Sykes asked Mr. Siskel, who was arguing for the government, whether the government had argued in the District Court that this conviction could be sustained solely upon honest services.

And, it is a colloquy worth listening to again. Mr. Siskel said, "Well, we didn't so – we didn't so argue explicitly, however . . ." and then he explained how the instruction would allow the conviction, and ended up urging you that this was a permissible basis on the record and the evidence –

JUDGE POSNER: Well, let me ask you about the Forum and Paxton sales, because your brief is puzzling. You say – I'm looking at page 10 of your – you know, the most recent filing – and you say, that you haven't argued that the $600,000 in those payments were re-characterized management fees.

Well, if there weren't how could the jury have convicted except by thinking that this was – this was a theft, right? And, there's no non-compete agreement, they've just got this $600,000, so . . .

MR. ESTRADA: What that is –

JUDGE POSNER: Right? The no agreement –

MR. ESTRADA: Is mistaken for several reasons

JUDGE POSNER: – yeah, no agreement. Right?

MR. ESTRADA: There was no estimate that was signed.

JUDGE POSNER: No agreement, yeah. No agreement.

MR. ESTRADA: Well –

JUDGE POSNER: They get it anyway. And, so how would the jury – what's the theory on which the jury would convict, but only on basis of honest services fraud?

MR. ESTRADA: I mean, that is actually pretty –

JUDGE POSNER: You get $600,000, and you don't have any agreement that entitles you to it that's –

MR. ESTRADA: Judge Posner –

JUDGE POSNER: – that looks like old-fashioned fraud.

MR. ESTRADA: I mean, Judge Posner, no it isn't. Actually, you know, the clients are as innocent of that as they are of the other counts, but let me just point out –

JUDGE POSNER: What do you mean innocent? Look, they were convicted of that, right?

MR. ESTRADA: Uh, in a –

JUDGE POSNER: So, what do you mean by innocent?

MR. ESTRADA: In a trial in which the jury was permitted to find them guilty of something that is not a crime –

JUDGE POSNER: Yes, but I don't understand. How could they have found honest services fraud, but not theft with regard to that $600,000?

MR. ESTRADA: Because the issue of that count, Judge Posner, was not whether these were management fees. We never contended –

JUDGE POSNER: That's right.

MR. ESTRADA: – they were.

JUDGE POSNER: That's right.

MR. ESTRADA: The issue was the intent to defraud, and the fact that the non-competition agreements had been approved by the board and the executive committee –

JUDGE POSNER: But, look, if there's no intent to defraud, they can't be convicted of anything.

MR. ESTRADA: Well, they can not be convicted of anything, but here, the jury was (inaudible) –

JUDGE POSNER: So, the jury must have found that there was an intent to defraud. And, the intent

to defraud means taking $600,000, and put in your pocket without having any right to it, without having any contractual right or any other right.

MR. ESTRADA: That was certainly one of the options the jury had (inaudible) –

JUDGE POSNER: No, that's the only option –

MR. ESTRADA: – no –

JUDGE POSNER: – because look, if they find no intent to defraud, they can't convict of either, honest services fraud, or monetary fraud. So, they must have found intent to defraud. And, the only intent to defraud that I can see, would be taking the $600,000.

MR. ESTRADA: Judge Posner, I understand what the argument that you're outlining is. If I could be permitted three sentences, to actually respond to it, I would really appreciate it. The issue here was, those were approved by the executive committee and the board.

JUDGE POSNER: That's what you say. Now, if they were approved, then there isn't any basis for honest services fraud.

MR. ESTRADA: But, there was a basis for the jury to conclude that the absence of procedural regularity, the actual drafting of the agreements, even though they were intended to be there, they – that the failure to draft them and sign (inaudible) –

JUDGE POSNER: No, that doesn't make any sense.

MR. ESTRADA: But, it does if you consider that the jury acquitted on counts two and three of the identical transactions, based on the same testimony,

where the buyers from Forum and Case (ph) (inaudible) –

JUDGE POSNER: They weren't identical. What the other Forum and Paxton; no, they had agreements in those cases.

MR. ESTRADA: Well, right, but the government (inaudible) –

JUDGE POSNER: Well, right that's a big difference. Like, they get the money, there's no agreement. The other cases, they're agreements.

MR. ESTRADA: Well, that is a difference, Judge Posner, but it's also the case that the testimony that the government proffered to the jury to underlie both counts, was that the buyer's never wanted either.

And, if the jury had not been skeptical of the testimony of the government, then it could not possibly have acquitted.

On this stage, we are entitled not to have the evidence looked at in the light most favorable to the government, but to assess under Chapman and Ystes v. Evatt whether there is a reasonable (inaudible) –

JUDGE POSNER: The question is what would a reasonable jury have done, right? And, a reasonable jury could not have convicted them on this $600,000, I don't think, on the basis of honest services fraud. It could only be on the basis of simple theft.

MR. ESTRADA: I think that is not consistent with the instructions that the jury was given, Judge Posner, and (inaudible) –

JUDGE POSNER: We're not talking about instructions, because instructional error is not conclusive. If no reasonable jury could have acquit – could

have found them guilty of honest services, if they – if all – if a reasonable jury could only have found guilt of theft, then the instructional error drops out.

MR. ESTRADA: But, you could only come to that conclusion by giving the government the benefit of inferences, which at this stage is – it is not entitled to –

JUDGE POSNER: I don't see that. It seems to me this is a very simple issue. Either they – there was no agreement, but they get the $600,000. Either they did that because – because it was just some oversight, that's your argument. Someone forgot to draft the agreement. That's one possibility.

The other possibility is that it is a fraud. And, the jury, in finding it was a fraud, rejected your accident theory. And, I don't know what else there is to say about that.

MR. ESTRADA: One of the flaws in that line of reasoning, Judge Posner, happens to be that it presumes that in order for the defendants to win, these theories had to be tendered to the jury as fully exclusive alternatives (inaudible) –

JUDGE POSNER: You're going back to instructional error, and you're not facing the fact, as it seems to me, that if the jury could – if a reasonable jury could only have found one of these offenses, and they certainly were charged on the – I mean the instructions did allow them to find a theft of this money, then the instructional error drops out.

MR. ESTRADA: I am going back to instructional error, Judge Posner, because it belies the apparent premise of your questioning, that in order for the defendants to win, you have to conclude that the jury had fully exclusive alternatives. In other words, that

honest services was one circle in a Venn Diagram, and that theft by fraud was a different circle.

Now, the problem with the nature of this alternative formulation was that at the very best, the honest services circle had a dot in the middle that was theft. So, that the nature of the error that is – that is being challenged here, is not (inaudible) –

JUDGE POSNER: I mean, you've lost me. Was the jury not instructed on monetary fraud as a theory?

MR. ESTRADA: It was instructed on monetary fraud as a theory (inaudible) –

JUDGE POSNER: Well, if a reasonable jury applied that instruction to the Forum and Paxton would've said, "Yes, this is fraud. This is either fraud or it's innocent," right? It's innocent if this was just an accident, but if there was an intent to defraud, it was an intent to take the $600,000.

MR. ESTRADA: Right, but –

JUDGE POSNER: It's not an intent to, you know, have a tax advantage against the Canadians, or to

MR. ESTRADA: I meant to say right as far as the bill –

JUDGE POSNER: You know, put management fees into another pocket. It wasn't that, right?

MR. ESTRADA: Judge Posner, some of that is right. Unfortunately, for the government, is not all that relevant because ultimately, you have to contend as well, that one of the vices with the honest services instruction – and I know that I'm going back to the instruction, but I think a (sic) actual under-

standing of the nature of the problem really is essential, in figuring out the nature of the harm to the defendants.

And, the honest services instruction had many features that were erroneous. One of them went to the intent element, which told the jury, disjunctively as well, that in order to convict the defendants of money fraud they basically, had to intend to steal. But, in honest services, if you read the instruction, a mere non- disclosure of pertinent facts could be enough for the intent to defraud.

Now, your question, in addition from having, I think, what I think is the wrong assumption that these were fully non-overlapping (inaudible) –

JUDGE POSNER: Okay. What is your theory? What is your conception of how a jury that convicted them of – when the 600 – the Forum and Paxton – what's your conception of how the jury framed that conviction in honest services terms? What was their thinking? What is the –

MR. ESTRADA: (Inaudible)

JUDGE POSNER: – thinking process that leads to there – leads there?

MR. ESTRADA: It is at the bottom of paragraph 21, in count one of the indictment, which asserts, and the jury has this in front of them, that a failure to disclose a related party transaction is honest services fraud. And so, if the defendants intended not to disclose that, under the instructions, they were guilty of fraud.

They would not be guilty of any theft, but in the government's information, and this is again – true again, for the APC counts at the bottom of paragraph

30, it was asserted as they were instructed, that the failure to disclose the transaction was itself a – an available fraud for this conviction (inaudible) –

JUDGE POSNER: That's actually not your – that's not the argument you make in your brief.

MR. ESTRADA: Well, we have made that and many other arguments. It's actually a fact. And, I mean, I do understand that the government would like to cast this as though they were alternatives, but, in fact, they were alternatives, but the theft that they claim was fully included within the honest services, the jury did not find – did not have to find theft, which is the relevant point –

JUDGE POSNER: Let me ask you about one of the other – the obstruction of justice. I don't see that, or understand your argument about obstruction of justice. Is it somehow that, since he couldn't be guilty of honest services fraud, because it's not nonexistent crime, he couldn't have obstructed justice? Is that the argument –

MR. ESTRADA: (Inaudible)

JUDGE POSNER: – or am I missing – all right, what is the argument?

MR. ESTRADA: We actually expressly stated that that was not our argument.

JUDGE POSNER: What is your argument?

MR. ESTRADA: Our argument is that anybody who's tried a case, knows that a jury is more likely to convict you of obstruction, if they think you are actually guilty of the crime. Based on the very (inaudible) –

JUDGE POSNER: Oh, no, no, but that's – that is departing from the assumption, which is fundamental that you have – that the question is, "What would a reasonable jury have done?" Not a jury that has some predisposition in favor of people who obstruct justice, but have not committed a crime.

MR. ESTRADA: Well –

JUDGE POSNER: So, this is, I think, a weakness in your general position. You don't focus on the fact that we have to decide, could a reasonable jury have acquitted of obstruction of justice, if honest services fraud wasn't in the case –

MR. ESTRADA: (Inaudible)

JUDGE POSNER: – and I don't see the connection between the honest services fraud and the – and the obstruction.

MR. ESTRADA: Well, the first connection is that they were expressly instructed that a proceeding in this case, which turned out to be flawed, was one of the proceedings that was a predicate for the obstruction conviction. That is just a Yates legal error that had the same ambiguity as did the other fraud counts. Apart from that, you also have, you know, the proposition (inaudible) –

JUDGE POSNER: That's an error in your favor.

MR. ESTRADA: Well, no –

JUDGE POSNER: Well, yes.

MR. ESTRADA: – it's an error in the government's favor.

JUDGE POSNER: No, not if they say, "You have to find honest services fraud in order to find obstruction of justice." That's an error in your favor.

MR. ESTRADA: Yeah, but I think we are talking about (inaudible) –

JUDGE POSNER: And, you can't use errors in your favor to upset the verdict.

MR. ESTRADA: But it's not an error in my favor, Judge Posner, if – I think you are talking about whether or not there was actually an official proceeding, and indeed (inaudible) –

JUDGE POSNER: All you need is an intent, right, for obstruction?

MR. ESTRADA: Well, we need a corrupt intent and a nexus, I mean (inaudible) –

JUDGE POSNER: Well, there's certainly a corrupt intent.

MR. ESTRADA: Well, that was a question for the jury –

JUDGE POSNER: Well, I know –

MR. ESTRADA: – Judge Posner.

JUDGE POSNER: – but the jury convicted him, and there's plenty of evidence that it was a corrupt intent.

MR. ESTRADA: (Inaudible)

JUDGE POSNER: He's trying to conceal – trying to hide evidence from the SEC and so on.

MR. ESTRADA: It would be difficult to understate the circularity of that reasoning, Judge Posner, because if you start with the proposition that they had an error, and they found him guilty anyway, then it seems that (inaudible) –

JUDGE POSNER: The error is – the error is either in your favor – it's irrelevant.

MR. ESTRADA: But, the error (inaudible) –

JUDGE POSNER: All you need for the obstruction of justice is that the defendant was trying to obstruct a – you know, an SEC investigation by removing, hiding these documents, right? That's a simple case. I don't see what it has to do with the honest services count.

MR. ESTRADA: Right. And, by a parity of reasoning, you could (inaudible) –

JUDGE POSNER: Well, don't parity of reasoning me. What does it have to do with the honest services count?

MR. ESTRADA: No – you know, the question of the motivation for the removal of the documents was a central issue in this trial, Judge Posner. If one reason (inaudible) –

JUDGE POSNER: Right. To hide the documents from the SEC.

MR. ESTRADA: Or to move them to another place because he was being kicked out of the place that –

JUDGE POSNER: What if they –

MR. ESTRADA: – (inaudible) –

JUDGE POSNER: – if they'd found that, they would've acquitted him.

MR. ESTRADA: No, because they – their conviction that he was actually guilty enabled them to conclude –

JUDGE POSNER: No –

MR. ESTRADA: – that he was more likely doing one –

JUDGE POSNER: – that's not – that's not a reasonable –

MR. ESTRADA: – rather than the other.

JUDGE POSNER: – that's not a reasonable charge.

JUDGE SYKES: On the obstruction counts –

MR. ESTRADA: Yes?

JUDGE SYKES: – there was visual evidence –

MR. ESTRADA: Right.

JUDGE SYKES: – and visual evidence, as anybody who has tried a case knows, is very powerful.

MR. ESTRADA: Right, but it was equally consistent with both side of the stories. I mean, you know, the government put a spin on it that he was trying to hide from the cameras. The argument, if you saw it, was that he was clearly ticked off and pointing at the cameras.

Now, this may have been a high handed thing for him to do, but the notion that the only inference that was possible on the basis of all the evidence, including the fact that he had to get all this stuff out, and – you know, after being there for 27 years, and everything else that he did that day, that the only possible inference was that he was attempting to obstruct a proceeding –

JUDGE POSNER: It's not the only possible inference. It's the inference drawn by the jury.

MR. ESTRADA: Yes, on the basis of a misapprehension as to whether –

JUDGE POSNER: Well –

MR. ESTRADA: – reasonably –

JUDGE POSNER: – so, you're saying a –

MR. ESTRADA: – he would have a motive to obstruct.

JUDGE POSNER: – confused jury. Okay. Well, thank you, Mr. Estrada. I'll hear from Mr. Chang. We'll give you a minute later.

MR. CHANG: May it please the Court. The instructional error here was harmless, beyond a reasonable doubt. And, we know this because the government presented one factual theory in support of both the honest services fraud, and the legally valid money fraud. That straightforward theory –

JUDGE POSNER: What about – so, if we look at the APC case, you know the Mammoth case. That's the one they convict – that's one convicted of –

MR. CHANG: Right.

JUDGE POSNER: – right. So, couldn't the jury have believed that they were owed these management fees, they wanted to scam the Canadian government, which is you know, irrelevant to us, and so they pretended that these management fees were actually compensation for covenant not to compete.

In doing this, they were depriving the Board of Directors of their honest services, because if the board had known about the Canadian tax advantage, it might have, you know, negotiated for a higher fee or something like that.

MR. CHANG: No, Your Honor. There's no risk the jury did that for a number of reasons. First, the government never asked the jury to convict on that factual basis. And, the – reviewing this from the perspective of a reasonable jury, listening to the presentation of the factual and legal arguments by

the government and the defense, the – it is unreasonable, I think, to assume that a jury would come up with a theory of conviction that the government didn't present and the defense didn't contest –

JUDGE POSNER: But, you did predict – but you did, obviously, present an honest services theory – was it just with regard to the other – the other – the ones they acquitted on, or what?

MR. CHANG: Your Honor, we did advance honest services, the theory of guilt, on each, and every one, of the mail and wire fraud counts, but the legal label – but all we did was put a legal label, in addition to money fraud, on the same factual basis.

That is, that the defendants stole this money – with Mark Kipnis' help, stole this money from the company. And, not because of some – not in order to get a Canadian tax break, and that they were simply re-characterizing owed management fees. We never asked the jury to convict on that basis.

JUDGE SYKES: You did argue for a conviction based on the failure to submit these payments to the audit committee and the board for approval, and other sort of iterations of a non-disclosure theory, which was you know, clearly, part of the jury instructions.

MR. CHANG: Well, Judge Sykes, the – we argued that that non-disclosure was evidence of the defendants' concealment that – of their theft of money from the company, but we didn't – we never argued that that standing alone, those non-disclosures standing alone, could form the basis of a conviction whether money fraud or honest services.

JUDGE SYKES: Well, how do we know that the jury didn't convict on that basis, since that was ar-

gued as a factual matter, and clearly was in evidence. And, the jury was invited, based on the instructions, to convict on that basis?

MR. CHANG: Well, I don't think the jury was invited to convict on that basis.

JUDGE SYKES: Well, what's the point of the instructions about Delaware fiduciary duty law, and this concept of a transaction being entirely fair, in order to satisfy the duty of loyalty –

MR. CHANG: Well –

JUDGE SYKES: – that officers and directors owe to the corporation, and that definition of fair dealing and fair price, folded into the idea of a transaction being entirely fair is extremely broad.

MR. CHANG: Well –

JUDGE SYKES: And, it includes, if it's not properly disclosed, if it's not properly initiated, and if it's not properly structured, negotiated, et cetera.

MR. CHANG: Judge Sykes, all of those – all of those instructions were put before the jury, because the jury first had to find, as a threshold matter, before the defendants could be convicted of honest services fraud, which was to find affirmatively as the misuse of the defendants' position for private gain. That was the affirmative definition, okay.

A threshold matter was that there had to be – the defendants had to owe a fiduciary duty. Another threshold requirement is that the defendants had to breach that fiduciary duty. But, there was an instruction that was explicit from the District Court, and this is on page 28 of the jury instructions, which is record 771 that a breach of fiduciary duty by an officer, or director, or controlling shareholder, under

Delaware law, does not, in and of itself, amount to a violation of the mail or wire fraud statute.

So, the jury first had to find a misuse of position for private gain, immediately following that affirmative instruction as to what honest services fraud is, with an instruction that compensation that's earned in the normal, you know, course of business with above- board channels – I'm paraphrasing that – was not private gain, okay.

And, that makes sense because the factual dispute that these – that the parties had, that the government had with the defense, was whether or not the defendants stole this money. And, not whether there was just a mere non-disclosure –

JUDGE POSNER: Well, what about – I don't see how you responded to my question. If they say, "Oh, the management – we were owed these management fees, and we had them characterized as non-compete – as compensation for the covenants not to compete – so that we could, you know, rip off the Canadians." Couldn't the jury have believed that, and said, "Yes, that's honest services fraud, because maybe the board, you know, if they'd known would've done something," but that wouldn't be theft of money, right?

MR. CHANG: Well, it would be theft of money if it was actually owed management fees. But, I guess I have two responses. One is, I don't think a reasonable jury would have found, as a factual matter, that this was, you know, purely owed management fees that was then not disclosed in order to get a Canadian tax break.

One reason, I think, the jury would not have done so, is, as I was saying, the government never

asked that the jury be so primed. And, I think it's unreasonable to assume that the jury is, you know (inaudible) –

JUDGE POSNER: But, you did – but, honest services is – if it existed, or if it did exist, it was a very effective rebuttal to their argument, right? Because they say, "Oh, management fees, just recharacterized." And, you can say, "Well, that's irrelevant because, you know, they have to deal honestly with the Board of Directors," right? So –

MR. CHANG: And, Judge Posner –

JUDGE POSNER: – you must have felt that having honest services – this is related to Judge Sykes' question – you must have felt having honest services in there was a help to you.

MR. CHANG: Well, excuse me. Let me take that first point first, which is, the government never did argue, either in its initial opening, or its rebuttal. You say it would be an effective rebuttal. It would have been an effective rebuttal. We never argued that to the jury.

You know, we still – even in our rebuttal argument, told the jury that the defendants, you know, for example, were robbing the shareholders of honest services because they were stealing money from the company.

And, one of the, you know, best examples of that is, during the rebuttal, the prosecutor said, "These are Hollinger International's assets that are being sold.

They owe their duty to Hollinger International."

So, this is the prosecutor blaming honest services in the rebuttal. "So, when I put on here, 'honest ser-

vices and the duty of loyalty,'" he's referring to the Power Point he had, "that's what I'm talking about. That's the fraud in this case." "The shareholders of Hollinger International are getting (sic) defrauded out of that $16.5 million because the buyers never wanted this stuff." That's the theft. And, that's just one example of the prosecutor, in the rebuttal, explaining and linking the honest services fraud to the theft.

And so, you will not find an "even if" argument, as effective as it might have been. We didn't present that argument. So, that's one point.

The other question you asked was, you know, we must have felt it had some value. Well, I must say that, you know, generally speaking, if you presented a, you know, you present us with two possible ways, two legal theories, to convict a defendant, we will ask for, you know, one of – we'll ask for the two, rather than the one. And, that's because, you know, juries are unpredictable. We do assume –

JUDGE KANNE: Let me take you back to the obstruction of justice. What was the evidence? What was contained in those boxes?

MR. CHANG: Some of non-compete agreements were in those boxes. And, it's true that the SEC and the investigators had obtained some of these documents, but the fact that the defendant, defendant Black, had some of those documents in his, you know, personal possession, of course, would be relevant to investigators.

That's why investigators ask for documents, not only from a company, generally, but from individuals. And, the defendant was on notice that the investigators would be serving document production – had

served document production requests on the defendant.

JUDGE KANNE: But, there was other material irrelevant to the criminal charge, right?

MR. CHANG: Yes, there are personal effects as well, but what the evidence showed, given that they were relevant and responsive, you know, documents. The evidence showed that, given the timing of the defendant's removal of the boxes. Sneaking out the back, waiting for the building to close, not enlisting help to move these 13 boxes, pointing to the video cameras as Judge Sykes pointed out.

He's pointing to the old video cameras that had been up there, and unbeknownst to him, there had been, you know, newly installed video cameras in non-descript locations that he didn't know about. And so, he was caught on video obstructing.

JUDGE KANNE: But, does that mean he thought the ones that he pointed to were not operating, or they wouldn't produce good images, or what was that?

MR. CHANG: Well, it's pointing out that he knows the locations of these cameras, and to – so they – and he ought to avoid being captured on those cameras. But, what he didn't know is that we was being captured on other video cameras.

And, I just want to make sure that it's – to return to the honest services convictions for a moment, that I think it's also very telling that, you know, the defense was never – never argued in their closing argument that there was some, you know, other factual theory that the government had, and that you ought not to convict on.

JUDGE SYKES: Right, but in a complex fraud case like this, this is a four-month trial, right?

MR. CHANG: Right.

JUDGE SYKES: And, 16 counts, RICO counts, and tax fraud counts, and no securities fraud count, but securities issues lurking underneath the surface; and multiple fraud counts, and the obstruction count. So, there's a lot of evidence that the jury has to cope with.

This is a jury of lay people in a complex fraud case. It's extremely important how the government conceptualizes the fraud and how the Court submits the fraud theory – the fraud theories to the jury, the fraud counts to the jury, on the instructions. That takes on much more significance than in a garden variety armed robbery case, or some other sort of a crime.

And, these counts were conceptualized on alternative bases. And, that runs through the jury instructions, clearly. The jury was invited to convict on either/or. The jury instructions are always stated in the disjunctive.

And, the way that it was argued. Ms. Ruder (ph) argued the crime in this case is not about the fact that the defendants got money. It's not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money. That's a non- disclosure theory.

MR. CHANG: Well (inaudible) –

JUDGE SYKES: And, that's submitted as an alternative basis in this case. And then, you know, there's other references of a like nature running through the closing arguments, and the govern-

ment's rebuttal closing argument, which is the last thing the jury hears before the case is – the instructions are submitted by the Court, and the jury gets the case.

And, that's of – you know, enormous significance in how the jury evaluates the evidence, a jury of lay people in a complex fraud case, after four months of evidence.

MR. CHANG: Judge Sykes, I agree with the observation in a complex fraud case, how the parties conceptualize the arguments are crucial. And, that's why I think it's in our favor that the government never argued to the jury that a mere non-disclosure is sufficient. And, indeed, in a passage that Your Honor quoted (inaudible) –

JUDGE SYKES: Stealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious, and it's part of the fraud that's alleged in this case.

MR. CHANG: (Inaudible)

JUDGE SYKES: It's an invitation to view the evidenced in alternative ways, and base a conviction on different theories.

MR. CHANG: Well (inaudible) –

JUDGE SYKES: And if, you know, a couple of the jurors accepted that this wasn't stealing, but it was a breach of the duty of loyalty, and there was a scheme, that's enough to convict.

MR. CHANG: But, a crucial thing is that the government argued only one theory as to – one factual theory – I'm sorry –

JUDGE SYKES: Two legal theories.

MR. CHANG: – two legal theories, but based on one factual theory, which is that the defendants stole (inaudible) –

JUDGE SYKES: Then, why put in all this stuff about Delaware corporate law, and what the fiduciary duties owed, consisted of?

MR. CHANG: Well –

JUDGE SYKES: What's the point of all that evidence?

MR. CHANG: – well, there's two points. One is that under, you know, this Court's case law at the time, misuse of position for private gain required, arguably required, a breach of fiduciary duty, required, as a threshold matter. So, we had to put in evidence of fiduciary duty.

And, the second purpose of the evidence was, it was used to explain, you know, why the board members trusted the defendants, because they were able to – they got hoodwinked in this case, the board did, because they put trust in the defendants because the defendants owed a fiduciary duty under Delaware law.

JUDGE SYKES: So, it wasn't introduced as an alternative basis for conviction.

MR. CHANG: It – we had to introduce that evidence to make out a misuse of office – a position for private gain.

JUDGE SYKES: Right. Because that's an element of honest services fraud, or was, under the law of this circuit.

MR. CHANG: Right. But (inaudible) –

JUDGE POSNER: Well, I think what you're saying is that one way of committing a fraud – one way of getting money fraudulently, is to violate one's fiduciary duties to shareholders, what have you. Isn't that what you're saying?

MR. CHANG: Well, even back then – even on the – we know that's not right now, but under the case law at the time, a mere breach of fiduciary duty by itself (inaudible) –

JUDGE POSNER: No, what I'm saying is, if – I think I'm trying to see if I understand what – when you say two legal theories, one factual theory. I think what you're saying is that they are many different ways to defraud somebody of money, and one would be just lying to the person. You know, saying, "I'm going to invest your money, and it's, you know, it's going to generate tremendous returns," when really it's a Ponzi scheme. That's a form of fraud.

Another form of fraud might be, concealing something from your Board of Directors, but if – you're saying if you stealing money – see, I guess the sense in which honest services fraud does survive the Skilling and the Black cases in the Supreme Court, if there's money involved. Isn't that true?

MR. CHANG: Well, after Skilling, there – it has to be a bribery, or kickback scheme, but what our submission is, is that we argued that the theft of the money was both a violation of 1341 (inaudible) –

JUDGE POSNER: So, you're saying – I'm stating too – I'm over – I'm stating too broadly what is left of honest services.

MR. CHANG: I think so, Your Honor –

JUDGE POSNER: Okay.

MR. CHANG: – (inaudible) –

JUDGE POSNER: It has to be –

MR. CHANG: – (inaudible) –

JUDGE POSNER: Okay.

(Cross talk)

MR. CHANG: – it has to be a bribery or kickback scheme –

JUDGE POSNER: That's fine.

MR. CHANG: – but I think the point remains true that what we argue to the jury, and what, you know, based on the defense arguments, as well, the jury was presented with one factual question. And, if they believe that the defendant stole the money from the company, then they ought to convict, both under the money fraud theory and the honest services (inaudible)

JUDGE SYKES: What if they didn't believe him?

MR. CHANG: I'm sorry, Your Honor.

JUDGE SYKES: What if they didn't believe that this was a theft?

MR. CHANG: Then they would have acquitted.

JUDGE POSNER: But, you didn't tell them. See, you didn't tell the jury, "Well, it's – you know – if you decide they didn't take anything, well, fine then, we're not going to – then you shouldn't convict." That's the missing link.

JUDGE SYKES: Right. And, the Court didn't tell the jury –

JUDGE POSNER: Right.

JUDGE SYKES: – that either.

JUDGE POSNER: Yeah.

JUDGE KANNE: Was there any discussion of a special verdict?

JUDGE SYKES: So, the Court had that option available –

MR. CHANG: I'm sorry, Your Honor.

JUDGE KANNE: Was there any discussion of a special verdict?

JUDGE POSNER: Yeah.

MR. CHANG: Yes, there was. We, initially, proposed a special verdict form, and the defendants resisted, or at least resisted to the point of – they wanted the special verdict form to go back after the defendants [sic] returned a general verdict –

JUDGE POSNER: Right.

MR. CHANG: – (inaudible) –

JUDGE POSNER: Right.

MR. CHANG: – and, so this was the issue that went up in the Supreme Court under – as to whether or not the absence of that special verdict form, or our proposal of it, would mean that the defendants forfeited, you know, this Yates error, which the Supreme Court, you know, rejected that position.

JUDGE POSNER: Yeah.

MR. CHANG: We are – despite having proposed a special verdict form, we are in a position of having to try to –

JUDGE POSNER: Yeah. Let me just ask –

MR. CHANG: – (Inaudible) the Yates Error –

JUDGE POSNER: – gave Mr. Estrada more time. I'll give you a little more time. What about this – the APC and the Mammoth case? Do you have a response to Mr. Estrada's argument about that?

MR. CHANG: Well, I – I mean – so, the argument I – it's not – there's some internal inconsistency. I mean, on the one hand, there's still, I think, there's still the argument that this was somehow a genuine non-compete, and – agreement. And, I think it's clear that, you know, this is not a genuine non-compete agreement.

There was only the Mammoth Times left. It's a subsidiary of International itself. There's no genuine non-compete agreement there. There's some argument that the defense makes that – well, it's a genuine non- compete because it bound the senior executives to not compete, not just with this Mammoth Times, you know, newspaper that was left within APC, but also all of APC's you know, affiliates. And, that's just –

JUDGE POSNER: Well, I – yeah. I'm sorry. I asked you the wrong – I confused it. You know, I understand. I understand the Mammoth issue. No, I meant the $600,000 –

MR. CHANG: Okay.

JUDGE POSNER: Yeah.

MR. CHANG: So, on Forum-Paxton –

JUDGE POSNER: Yeah.

MR. CHANG: – all right, so, are these legitimate non-compete agreements, and the – and there was an oversight, could they have forgot to execute them? No.

Lloyd Case the CEO of Forum, with no reason to lie – he's the buyer in the Forum deal, said he didn't want a non-compete. And, similarly, in Paxton, Paxton just wanted the non-compete from International, but not the senior executives.

And so, there's no reason to have a non-compete when they buyers aren't asking for it. So, it's not a matter of oversight. There's no genuine non-compete there.

And, I think you're right that – your observation is correct that if the jury had believed there was no intent to defraud, that there was just an oversight, well, then it would've acquitted.

JUDGE POSNER: Okay. Thank you, Mr. Chang. So, Mr. Estrada, your time expired, but you can have another couple of minutes.

MR. ESTRADA: Thanks, Your Honor. Just a couple of quick points and there's a lot to cover. You know, the one thing that I agree with that you said, Judge Posner, was during the argument that my opponent – you said that everything was irrelevant if you did not deal honestly with the board. And, that's the fundamental problem here, both as to what the error is, and to why the government cannot prove the prejudice.

To take the issue of Forum and Paxton, which I know you questioned me about. I will go back again, to what the information told the jury. And, based on the arguments, and the instructions, and the evidence, the jury could reasonably have concluded that failing to draft the contracts was an oversight, and an accident, and not a theft, but that the later subsequent failure to tell the board was a breach of fiduciary duty. And, that would allow a fully effective ba-

sis for conviction on count seven, which has absolutely whatsoever nothing to do with fraud.

JUDGE SYKES: And, what's the relationship between count seven and counts two and three?

MR. ESTRADA: There is no relationship. Exactly right. I mean, one of the things that is astonishing to me, about this case, is that if the jury had believed all of these people, they would have convicted on everything. Forum and Paxton are sort-of exemplary to that.

Karen – Case (ph) and Paxton both testified that they had not the slightest interest on the Hollinger Inc., non-compete contract, which are at issue in counts two and three. If the jury had thought they were telling the truth, they would have convicted on counts two and three. And so, it is nearly impossible, as we have, I think, demonstrated that you can say that a jury could only have reached the conclusion that is favorable to the government, by the required standard of beyond a reasonable doubt.

I will say, briefly, about obstruction. The testimony of the government's own witnesses, the security guard, was that the change in the cameras covered the exact same area. If – you know, he clearly knew cameras were there. He was pointing at the old ones. And, the new ones were elsewhere.

JUDGE POSNER: No, but the problem is the lack of any analytical connection between the obstruction of justice and the other – and the honest services fraud.

MR. ESTRADA: The analytical connection was spelled out in the instructions, which told the jury that if he intended to obstruct a not-yet-pending proceeding, which is, you know, the future criminal

prosecution, that that was, by itself, a basis for conviction. To be sure, they had other options, but this is why it is of a piece with the Yates ambiguity (inaudible) –

JUDGE POSNER: I don't understand. He certainly could be prosecuted, even if there were no honest services conception, right?

MR. ESTRADA: Yes, but he certainly would not have been convicted, which is the point of the second (inaudible) –

JUDGE POSNER: No, no, I don't understand. When he was removing those boxes, you know, he knew he faced potential criminal proceedings –

MR. ESTRADA: And, if we could have a reasonable assurance that the jury based the conviction on that, and concluded that acted – that he acted corruptly on that basis, then you would be correct. But, the problem here is one of ambiguity of the verdict. And, the key phrase here is not whether there was going to be a proceeding, but whether he was acting corruptly. If the U.S. Attorney –

JUDGE POSNER: But, a reasonable jury – I don't see how a reasonable jury could convict – could convict him of obstruction of justice because of some misunderstanding of honest services. I don't get it.

MR. ESTRADA: No. A reasonable jury would think it more likely that of the two available explanations for his conduct, the corrupt one and the non-corrupt one, that the corrupt one was more likely if he, in fact, was guilty of something. And, given that it is highly likely that they thought he was guilty of honest services fraud, their conception in picking the inferences from the evidence was unavoidably

tainted by their understanding of what the proceeding was.

Not because there was no official proceeding, meaning, if the U.S. attorney takes a notion to investigate me for having an affair with Minnie Mouse, and actually calls a grand jury, there is undoubtedly an official proceeding. But, if I burn my Disney comics, I don't think people would say I acted corruptly. And, the point here is that (inaudible) –

JUDGE POSNER: On the contrary.

(Laughter)

JUDGE POSNER: You burned them because you were afraid you were going to be prosecuted for your relationship with Minnie Mouse, right?

MR. ESTRADA: Well –

JUDGE POSNER: There's no other inference.

MR. ESTRADA: Well –

JUDGE POSNER: Why else would you burn your comics?

MR. ESTRADA: Normally – no, the inference as to the motivation is correct. Whether or not it is corrupt is a different matter. And, the question here is – don't forget, I mean, there was an entirely plausible and indeed compelling basis for concluding –

JUDGE POSNER: But, the difference also with the Minnie Mouse –

MR. ESTRADA: is that there was another theory –

JUDGE POSNER: – even though the Supreme Court held that the honest services theory was invalid, still, reasonable people believed it was a serious

offense, and a lawful offense. And so, if you try to put yourself in your client's mind, he would worry that he could be convicted of honest services fraud, and therefore, he better, you know, see what's in these documents, maybe conveniently lose some of them.

MR. ESTRADA: Yeah, except that every piece of paper in that office, as was testified at trial, had been examined and all of it, you know –

JUDGE POSNER: Oh, now you're getting to the merits of the obstruction of justice, right?

MR. ESTRADA: But, Judge Posner, of course, I am. And, the question is, my client was entitled to a jury trial on the obstruction charge. He had more (inaudible) –

JUDGE POSNER: But, you're saying every instructional error is reversible.

MR. ESTRADA: No, I am saying that where there is a hotly contested issue, as this Court said in the L.E. Myers case, and that is the centerpiece of the trial, you cannot simply assume that in the absence of the error, the jury would have discounted the exculpatory explanation, which actually turned out to be far more compelling than the inculpatory explanation.

If we were to start every harmless error case with the proposition that the fact-finding is obviously the first premise in the jury, and the jury found you guilty, then no conviction would ever be harmless. And, that's just an untenable view of the law, Judge Posner.

JUDGE POSNER: Okay.

MR. ESTRADA: Thank you very much.

JUDGE POSNER: Okay. Well, thank you to both counsel. And, the case will be taken under advisement. And, the Court will recess.

(Whereupon, the hearing in the United States of America v. Conrad M. Black was adjourned.)

* * *

180 (2)

No. 10-1038

In the Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied harmless error review in determining that the district court's instructional error on the honest services theory of mail fraud did not require reversal of petitioners' convictions on one of the mail fraud counts.

2. Whether the court of appeals erred in concluding that the instructional error on honest services fraud did not require reversal of petitioner Black's conviction on the separate charge of obstruction of justice.

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In the Supreme Court of the United States

No. 10-1038

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 625 F.3d 386. An earlier opinion of the court of appeals (Pet. App. 17a-33a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2010. A petition for rehearing was denied on December 17, 2010 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on February 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Black was also convicted of obstructing justice, in violation of 18 U.S.C. 1512(c)(1). Black was sentenced to 78 months in prison, petitioner Boultbee to 27 months, and petitioner Atkinson to 24 months. The court of appeals affirmed their convictions. Pet. App. 17a-33a. This Court vacated the judgment and remanded the case for reconsideration. 130 S. Ct. 2963 (2010). On remand, the court of appeals reversed petitioners' convictions on two of the mail fraud counts; affirmed petitioners' convictions on the third mail fraud count; affirmed Black's conviction for obstruction of justice; and vacated the sentences and remanded for resentencing. Pet. App. 1a-14a.[1]

1. Black was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), a publicly traded company that owns newspapers. Boultbee and Atkinson were also senior executives of Hollinger. Pet. App. 18a; Nos. 07-4080, 08-1030, 08-1072, 08-1106 Gov't C.A. Separate App. 531-533 (Gov't C.A. App. *Black I*).

Hollinger was controlled by a Canadian company called Ravelston, in which Black owned a majority stake. Boultbee and Atkinson, as well as F. David Radler, another Hollinger executive, also owned stock in Ravelston. Black, Boultbee, Atkinson, and Radler were not

[1] Boultbee and Atkinson have each been resentenced to time served. No. 05-CR-727 Docket entry No. 1182 (N.D. Ill. Mar. 24, 2011); *id.* Docket entry No. 1184 (N.D. Ill. Apr. 4, 2011). Black's resentencing is currently scheduled for June 24, 2011. *Id.* Docket entry No. 1168 (N.D. Ill. Jan. 13, 2011).

paid directly by Hollinger but instead by Ravelston, which received management fees from Hollinger in exchange for their services. Pet. App. 18a; Gov't C.A. App. *Black I* 53-56 , 60-67, 212, 553, 557.

In 1998, Hollinger began selling many of its small community newspapers. In connection with those sales, Hollinger frequently executed non-competition agreements in which it promised the purchaser that it would not operate a newspaper near the newspapers it sold for a certain period of time after the sale. Petitioners used purported non-competition agreements to pay themselves millions in fees that Hollinger did not authorize for that purpose, from funds that would otherwise have gone to Hollinger. Pet. App. 8a, 11a-12a, 18a-20a; No. 05-CR-727, 2007 WL 3254452, at *4-*9 (N.D. Ill. Nov. 5, 2007); Gov't Exh.-Board-1B; 4/24/07 Tr. 5435-5439; 5/2/07 Tr. 7112.

The APC Scheme. One of petitioners' schemes involved a Hollinger subsidiary called APC, which was in the process of selling the newspapers it owned. When APC had only one newspaper left—-a weekly community newspaper in Mammoth Lake, California--co-defendant Mark S. Kipnis, another Hollinger executive, prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, Atkinson, and Radler, purportedly in exchange for their promises not to compete with APC or its affiliates for three years after they stopped working for Hollinger. Unlike the non-competition agreements executed by Hollinger, the APC agreement was not linked to the sale of any newspapers. Instead, it involved freestanding promises by Black and the others not to compete with a company that they themselves owned. When the agreement was executed, no reasonable probability existed that they would start

a newspaper in Mammoth Lake (population approximately 7000). The checks for $5.5 million were backdated to the year in which APC sold most of its newspapers in order to make the phony non-competition payments seem more plausible. Petitioners did not disclose the transaction to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 8a-9a, 18a-20a; No. 08-876 J.A. 106a-107a, 123a-124a, 153a-158a (J.A. *Black I*); Gov't C.A. App. *Black I* 127-128, 182, 196-201, 205-206, 208-209, 214, 398, 403, 408, 413, 420, 539, 568, 599.

The Forum/Paxton Scheme. Another scheme involved the payment of $600,000 in proceeds from the sale of newspapers to Forum Communications Co. and Paxton. Neither Forum nor Paxton requested non-competition agreements with individual executives in connection with those sales, and none was ever executed.[2] Instead, after a phone conversation with Black, Radler inquired whether any funds from the sales had been set aside for individual non-competition agreements. Radler learned that no money had been set aside for that purpose, because no non-competition agreements had been executed, but that $600,000 remained from the sale. Black and Radler then agreed that Radler would divide the money among Black, Radler, Atkinson, and Boultbee, according to the same formula used to divide past non-competition payments. Even though these pay-

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[2] Based on a joke that Radler made in a note to petitioners, Pet. App. 320a; see p. 10 & note 4, *infra*, petitioners assert (Pet. 6) that Forum and Paxton requested individual non-competition agreements. But the officers of the companies testified precisely the opposite, J.A. *Black I* 35a-39a, 42a-47a, as did Radler himself, Pet. App. 190a.

ments were related-party transactions, petitioners did not seek approval from the audit committee. Pet. App. 11a-12a; J.A. *Black I* 35a-39a, 42a-47a, 104a-107a, 111a-115a, 123a-125a, 140a-153a; Gov't C.A. App. *Black I* 604, 609; 4/25/07 Tr. 5510, 5531-5532, 5541-5542; 4/27/07 Tr. 6059; 5/1/07 Tr. 6624.[3]

Black's Obstruction of Justice. As the fraud scheme came to light, the Securities and Exchange Commission (SEC), as well as law enforcement authorities and a federal grand jury, opened investigations into petitioners' conduct. Black was aware of those proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from Black. On May 20, Black, along with his personal assistant, removed from his office 13 boxes of documents including some relevant to the pending proceedings. After his assistant contacted Black to inform him that she had been prevented from removing the boxes, Black drove to the building with his chauffeur and parked in a location where he did not typically park. Black, his assistant, and the chauffeur then removed the boxes from a back stairway. A security video showed Black pointing out cameras in certain parts of the building. Unbeknownst to Black and his assistant, another video camera captured Black remov-

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[3] Petitioners incorrectly contend (Pet. 8) that when Radler ordered the payments, he believed that individual non-competition agreements had been executed. In fact, Radler testified that he and Black ordered the payments only *after* he learned that "nothing had been done" and "there [were] no non-competes." J.A. *Black I* 148a-149a. Radler further testified that he did not advise the Board or its audit committee about the payments because Forum and Paxton had not requested individual non-competition agreements and he "knew" the "payment was wrong." Pet. App. 190a; see p. 19, *infra*.

ing the boxes. Pet. App. 4a, 28a; 2007 WL 3254452, at *13; Gov't C.A. App. *Black I* 273-276, 284, 312-316, 318, 639, 646, 654; 5/31/07 Tr. 11,413, 11,500, 11,506.

2. Petitioners were charged with, among other crimes, multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Pet. App. 36a-66a, 68a-89a. In addition, Black was charged with obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 104a-109a. The indictment alleged, and the government proceeded, on two overlapping theories on the mail fraud counts: (1) that petitioners stole money from Hollinger by fraudulently paying themselves bogus and unapproved non-competition payments; and (2) that, in making the payments to themselves and failing to disclose them, petitioners deprived Hollinger of their honest services as managers of the company. *Id.* at 37a-42a, 47a-48a, 56a-59a, 63a-65a. The district court instructed the jury that it could find petitioners guilty under either theory. *Id.* at 306a. Because petitioners objected to the use of a special verdict form, the jury rendered only a general verdict on the mail fraud counts. *Id.* at 26a-27a. The jury found petitioners guilty on two mail fraud counts involving the APC scheme and one mail fraud count involving the Forum/Paxton scheme. 2007 WL 3254452, at *3. The jury also found Black guilty of obstruction of justice. *Ibid.* The jury acquitted petitioners and Kipnis on several other mail fraud counts, two of which involved the Forum/Paxton scheme. Unlike the Forum/Paxton count on which the jury found petitioners guilty, the Forum/Paxton counts on which the jury acquitted involved non-competition agreements that were actually executed, and those agreements were with Hollinger's holding company rather than petitioners. *Ibid.*; Pet. App. 13a, 57a; J.A. *Black I* 38a, 40a-42a.

3. On appeal, petitioners contended that the district court committed various instructional errors, including giving an incorrect instruction on honest services fraud. Petitioners also contended that the evidence was insufficient to support their convictions. The court of appeals rejected petitioners' claims. Pet. App. 17a-33a.

4. Petitioners sought this Court's review, and the Court granted their petition for a writ of certiorari and vacated the judgment of the court of appeals. 130 S. Ct. 2963 (2010). The Court relied on its decision the same day in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), which held that the honest services component of the mail fraud statute criminalizes only schemes involving bribes and kickbacks. The Court concluded that its holding in *Skilling* established the invalidity of the honest services instructions in this case, which did not require the jury to find that petitioners' offenses involved bribes or kickbacks. 130 S. Ct. at 2968. The Court remanded the case to the court of appeals for that court to determine whether the instructional error was harmless. *Id.* at 2970. The Court also left for the court of appeals on remand Black's claim "that spillover prejudice from evidence introduced on the mail-fraud counts requires reversal of his obstruction-of-justice conviction." *Id.* at 2970 n.14.

5. On remand, the court of appeals reversed petitioners' convictions on the APC mail fraud counts, affirmed their convictions on the Forum/Paxton mail fraud count, and affirmed Black's obstruction-of-justice conviction. Pet. App. 1a-14a.

a. The court of appeals first rejected Black's "prejudicial spillover" challenge to his obstruction-of-justice conviction. Pet. App. 3a-8a. The court observed that, because the jury was separately instructed on obstruc-

tion, its receipt of an erroneous instruction on the fraud charges would "ordinarily be irrelevant." *Id.* at 6a. The court recognized, however, that, if an erroneous instruction on one count is apt to have tainted the jury's consideration of other counts as well, a defendant may be entitled to a new trial on those counts. *Ibid.* The court then determined that there was no such taint here. The court explained that "[t]he theory of honest-services fraud submitted to the jury was esoteric rather than inflammatory; the evidence of such fraud was a subset of the evidence of pecuniary fraud; and the evidence of obstruction of justice was very strong." *Ibid.* The court therefore concluded that "[n]o reasonable jury could have acquitted Black of obstruction if only it had not been instructed on honest-services fraud." *Ibid.*

The court rejected Black's contention that the jury would not have concluded that he acted with the requisite corrupt intent in removing documents from his office if it had known that the conduct being investigated did not constitute honest services fraud. Pet. App. 6a-8a. The court explained that "Black was not under investigation for an obviously nonexistent crime * * * ; he was under investigation for conventional pecuniary fraud as well as honest-services fraud." *Id.* at 7a. Black "could not have known that years later the Supreme Court would invalidate" the honest services fraud charge. *Ibid.* "And if he were clairvoyant," the court observed, "he would have known that the other fraud charge—pecuniary fraud—would not be invalidated." *Ibid.*

b. The court of appeals next addressed whether the district court's instructional error on honest services fraud required reversal of petitioners' mail fraud convictions on the APC counts. Pet. App. 8a-11a. The court

noted that those convictions could have rested on either or both of two legal theories—honest services fraud and traditional pecuniary fraud. *Id.* at 9a. Although the instructions on honest services fraud were flawed, the instructions on pecuniary fraud were correct. *Ibid.* The court explained that, even though the jury's general verdict did not specify on which theory or theories the jury had relied, the instructional error was nonetheless subject to harmless error review. See *id.* at 2a-3a. Relying on this Court's decisions in *Hedgpeth* v. *Pulido*, 129 S. Ct. 530, 531-532 (2008) (per curiam), and *Neder* v. *United States*, 527 U.S. 1, 15-16 (1999), the court of appeals stated the applicable harmless error test as follows: "[I]f it is not open to reasonable doubt that a reasonable jury would have convicted [petitioners] of pecuniary fraud, the convictions on the fraud counts will stand." Pet. App. 3a.

Accordingly, the court defined the question before it as "whether a reasonable jury might have convicted the defendants of depriving the company of their honest services for private gain but not have convicted them of pecuniary fraud." Pet. App. 9a-10a. The court concluded that this scenario was "unlikely" but that "no stronger assertion was possible." *Id.* at 10a. The court explained that petitioners' defense at trial was that the $5.5 million they received from APC represented management fees owed them by Hollinger and that they had characterized the fees as non-competition payments in the hope that Canada might not treat the fees as taxable income. *Id.* at 8a-9a. The court noted that "[t]here was plenty of evidence that Hollinger did not owe [petitioners] $5.5 million in management fees, but the evidence was not conclusive, while all that the jury had to find in order to convict them of honest-services fraud was their

failure to level with the board and audit committee, which was irrefutable." *Id.* at 10a. The court therefore reversed petitioners' convictions on the APC counts. *Id.* at 14a.

c. Last, the court of appeals addressed whether the instructional error on honest services fraud required reversal of petitioners' convictions on the Forum/Paxton count. Pet. App. 11a-14a. The court noted that petitioners did not contend that the $600,000 they had paid themselves from the Forum/Paxton transaction constituted management fees owed them by Hollinger. Petitioners instead contended the money was compensation for *bona fide* agreements not to compete with the community newspapers that Hollinger had sold to Forum and Paxton. *Id.* at 11a. The court observed that petitioners' contention was "implausible" for multiple reasons, including that petitioners "could have no interest in going into competition with [Forum and Paxton] as individuals," *ibid.*; the owners of Forum and Paxton, who were disinterested witnesses, testified that they did not request any agreements, *ibid.*; and a "clowning note" from Radler to petitioners "implicit[ly] boast[ed] that the covenants were fabrications." *Id.* at 11a-12a, 13a; see note 2, *supra*.[4]

What made petitioners' contention "decisively unbelievable," the court observed, was that no non-competition covenants actually existed. Pet. App. 12a.

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[4] The note stated, in pertinent part, that Forum and Paxton had "asked for a 5-year non-compete from [Black] and me covering not only the states wherein they purchased assets but those states that border the said states. This would leave us only Alaska, Wyoming and Louisiana for us to continue our activities * * * . I have been assured there is [sic] suitable accommodations four [sic] our new headquarters in Casper, Wyoming." Pet. App. 11a-12a.

That fact alone, the court reasoned, "fatally undermine[d]" petitioner's challenge to their Forum/Paxton fraud convictions. *Ibid.* The court explained that "[e]ither the failure to prepare covenants was an innocent mistake," as petitioners contended, in which case the jury could not reasonably have found petitioners guilty of fraud under either an honest services or a pecuniary fraud theory; "or no covenants were intended, and the fees were part of the purchase price of the newspapers, owed to Hollinger and stolen by [petitioners]," in which case petitioners were guilty of pecuniary fraud. *Ibid.* The court therefore concluded that "[n]o reasonable jury could have acquitted [petitioners] of pecuniary fraud [on the Forum/Paxton] count but convicted them of honest-services fraud." *Ibid.*

The court rejected petitioners' argument that the jury could have believed that the non-existence of the agreements was an innocent mistake but found petitioners guilty of honest services fraud because they had failed to disclose the payments to the board. Pet. App. 12a-13a. First, the court noted, the trial evidence and closing arguments focused not on the failure to disclose but on whether the non-existence of any agreements was merely an oversight or was instead proof of pecuniary fraud. *Ibid.* More important, the court reasoned, "had the jury believed that a failure to disclose the fees for promising not to compete * * * was honest-services fraud, it would have convicted [petitioners] on all the [Forum/Paxton] fraud counts, because [petitioners] disclosed those fees neither to the board nor to the shareholders; and the jury didn't do that." *Id.* at 13a. Instead, the court noted, the jury acquitted on two fraud counts related to Forum/Paxton, which involved noncompetition agreements that had actually been issued

(by Hollinger's holding company rather than petitioners). *Ibid.*

In concluding, the court further noted that, in light of the entire record, "the evidence of pecuniary fraud [on the Forum/Paxton count was] so compelling that no reasonable jury could have refused to convict the defendants of it." Pet. App. 13a-14a. The court therefore held that the instructional error did not require reversal of petitioners' convictions on that count. *Id.* at 14a.

ARGUMENT

Petitioners contend (Pet. 18-21) that the court of appeals misapplied harmless error review in upholding their convictions for mail fraud on the Forum/Paxton count. In addition, Black argues (Pet. 26-28) that the court of appeals erred in refusing to reverse his obstruction of justice conviction. Those fact-bound contentions lack merit and do not warrant this Court's review. Contrary to petitioners' assertions (Pet. 28-34), the decision below does not conflict with any decision of another court of appeals or with the state court decisions on which petitioners rely. This Court's review is therefore not warranted.

1. a. The court of appeals correctly affirmed petitioners' convictions on the Forum/Paxton count. Pet. App. 11a-14a. In decisions issued before *Chapman* v. *California*, 386 U.S. 18 (1967), which established that constitutional errors can be harmless, this Court had held that a general verdict of guilty must be set aside if the jury was instructed on alternative theories of guilt and "it is impossible to tell" whether the jury relied on a valid or invalid theory. *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). Recently, however, the Court held that

alternative theory error may be harmless even in cases in which the jury may have relied on the invalid theory. *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). In those circumstances, reviewing courts must apply the same harmless error analysis that applies when the trial court fails to instruct the jury on an element of an offense. *Id.* at 532 (citing *Neder* v. *United States*, 527 U.S. 1 (1999)). In *Neder*, the Court held that such instructional errors are harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18; see *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011). The Court further held that the government may satisfy that standard by showing that the evidence of guilt was "overwhelming" and either that the defendant did not contest the omitted element or that he failed to present evidence sufficient to support a contrary finding. *Neder*, 527 U.S. at 17, 19.

In this case, application of the overwhelming evidence test was not necessary to uphold petitioners' convictions on the Forum/Paxton count, because the court of appeals concluded that the jury actually found facts establishing petitioner's guilt on that count under the valid pecuniary fraud theory. As the court explained (Pet. App. 12a), petitioners' defense on that count was that the $600,000 that they took from the proceeds of the Forum/Paxton transaction was for *bona fide* non-competition agreements and that their failure to reduce the agreements to writing was an innocent mistake. The jury's guilty verdict necessarily indicates that the jury rejected petitioners' defense and therefore that it believed that there were no non-competition agreements; otherwise, it would have had to acquit. *Ibid.* And if there were no non-competition agreements, then peti-

tioners must have been guilty of pecuniary mail fraud. *Ibid.* As the court further explained, it is not possible that the jury credited petitioners' "innocent mistake" defense but nonetheless convicted them under an honest services theory because of their failure to disclose the payments. *Id.* at 12a-13a. If the jury believed that failure to disclose legitimate fees was honest services fraud, then it would not have acquitted on the other two Forum/Paxton counts, which likewise involved a failure to disclose. *Id.* at 13a.[5]

Unlike in *Yates* and *Stromberg*, in this case it *is* possible to tell that the jury found facts establishing guilt on the valid theory. Accordingly, examination of the strength of the government's proof is not necessary to show that the instructional error was harmless. In *Neder*, the Court implicitly recognized that instructional errors are harmless if the jury must have found facts establishing guilt under correct instructions (although the Court concluded that harmlessness can also be established in other ways). See 527 U.S. at 13-14; *Monsanto* v. *United States*, 348 F.3d 345, 350, 351 & n.6 (2d Cir. 2003), cert. denied, 543 U.S. 831 (2004). The Court referred to that analysis as the "functional equivalence" test— a test that finds harmlessness when the facts necessarily found by the jury are the "functional equivalent" of a finding of guilt on the valid theory. *Neder*, 527 U.S. at 13-14; see also *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judg-

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[5] The acquittals on the other two counts make sense, however, if the jury's guilty verdict was based on a pecuniary fraud theory. Unlike the Forum/Paxton count on which the jury found petitioners guilty, the counts on which the jury acquitted involved non-competition agreements (with Hollinger's holding company rather than petitioners) that actually existed. See pp. 6, 11-12, *supra*.

ment). The courts of appeals have routinely applied functional equivalence analysis to find instructional errors harmless, including alternative theory errors. See, *e.g.*, *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998); *United States* v. *Hastings*, 134 F.3d 235, 241-242 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Washington*, 106 F.3d 983, 1013 (D.C. Cir.) (per curiam), cert. denied, 522 U.S. 984 (1997); *United States* v. *Doherty*, 867 F.2d 47, 57-58 (1st Cir.), cert. denied, 492 U.S. 918 (1989); *Moore* v. *United States*, 865 F.2d 149, 154 (7th Cir. 1989); *United States* v. *Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); see also *United States* v. *Skilling*, No. 06-20885, 2011 WL 1290805, at *2 (5th Cir. Apr. 6, 2011). The court below correctly employed that analysis in determining that the instructional error here was harmless as to the Forum/Paxton count, and that case-specific determination does not warrant this Court's review.

b. Although no further analysis was necessary to find the instructional error harmless, the court below—in accordance with the "overwhelming" evidence test endorsed in *Neder*— also examined the strength of the government's case and concluded that the evidence of pecuniary fraud was "so compelling" that a properly instructed jury could not reasonably have failed to find petitioners guilty on that theory. Pet. App. 13a-14a. Petitioners contend (Pet. 18-26) that the court of appeals misapplied that further (but unnecessary) aspect of its harmless error analysis. In particular, petitioners argue that the court failed to focus on what "*this jury*" found and that the court ignored or slighted evidence favoring the defense, deeming the instructional error harmless even though petitioners purportedly presented

sufficient evidence to support an acquittal. Pet. 24-26. Petitioners' argument ignores the court's reliance on the "functional equivalence" test. That test turns precisely on "what the jury *actually* found." *Peck* v. *United States*, 102 F.3d 1319, 1322 (2d Cir. 1996). Those actual findings independently establish that the instructional error was harmless as to the Forum/Paxton count. Thus, even if there were any error in the remainder of the court's harmless error analysis, it would have no effect on the judgment.

In any event, the court of appeals committed no error in the remainder of its harmless error analysis. The court specifically invoked *Pulido* and *Neder*, and it correctly paraphrased the *Neder* standard. Compare Pet. App. 3a ("[I]f it is not open to reasonable doubt that a reasonable jury would have convicted [petitioners] of pecuniary fraud, the convictions on the fraud counts will stand.") with *Neder*, 527 U.S. at 18 ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"). Although this Court has sometimes articulated the standard as "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" *id.* at 15 (quoting *Chapman*, 386 U.S. at 24), that formulation is just another way of asking whether it is beyond reasonable doubt that a "rational" or "reasonable" jury "would have" found the defendant guilty absent the error. If the evidence of guilt is so compelling that no properly instructed jury could reasonably have refused to find the defendant guilty, then the error

did not contribute to the verdict. See *Skilling*, 2011 WL 1290805, at *2.[6]

Petitioners' fact-bound disagreement with the court of appeals' application of the *Neder* standard does not warrant this Court's review; and, in any case, the court of appeals correctly applied the standard. Thus, the court held that the instructional error was not harmless as to the APC counts even though "plenty of evidence" supported the conclusion that petitioners committed pecuniary fraud. Pet. App. 10a. The court explained that, in light of the defenses raised by petitioners, it could not determine that the evidence of guilt was "conclusive." *Ibid.* Likewise, on the Forum/Paxton count, the court addressed petitioners' defenses that the $600,000 was for *bona fide* non-competition agreements and that the non-existence of any agreements was attributable to innocent mistake, *id.* at 12a, but the court concluded that, despite petitioners' defenses, "no reasonable jury could have refused to convict [petitioners of pecuniary fraud.]" *Id.* at 14a. The court was not required to discuss item by item all of the evidence presented by the defense to establish that the court had considered that evidence in reaching its conclusion.

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[6] Petitioners are incorrect insofar as they suggest that a finding of harmlessness may rest *only* on what the jury *actually* found. Indeed, in *Neder*, the Court held that a total failure to instruct the jury on an element of a charged offense may be harmless notwithstanding that the jury was thereby "preclude[d] [from giving] any consideration [to] evidence relevant to the omitted element." 527 U.S. at 17-18. If the harmless error analysis was limited to what the jury actually found, there would no need for the *Neder* test in cases involving alternative theory error; instead, the analysis would turn entirely on the *Stromberg-Yates* determination whether it is possible to tell that the jury relied on the valid theory. That would nullify the holding in *Pulido*.

Petitioners identify four factors that the court of appeals purportedly neglected, but none undermines the court's conclusion that no reasonable jury could have failed to find petitioners guilty of pecuniary fraud on the Forum/Paxton count. First, petitioners argue (Pet. 24-25) that the acquittals on other mail fraud charges establish that the Forum/Paxton verdict could not have rested on a finding of pecuniary fraud. That argument overlooks the significant differences between the two sets of charges. The charges on which petitioners were acquitted all involved payments under actual non-competition agreements made in connection with actual sales by Hollinger of newspaper companies that it owned. In contrast, the Forum/Paxton count on which petitioners were convicted involved payments that were labeled non-competition payments even though no non-competition agreements ever existed.

Next, petitioners argue (Pet. 25) that the court of appeals failed to "address" the jury instructions, which allowed the jury to find them guilty of mail fraud based entirely on the invalid honest services theory. But in alternative theory cases in which one theory is determined on appeal to be legally invalid, the jury instructions will *always* have permitted conviction based solely on the invalid theory. If that fact required reversal, alternative theory error could never be harmless absent a finding that the verdict actually rested on the valid theory. Yet *Pulido* held that alternative theory error may be harmless under the *Neder* standard. In any event, the court of appeals plainly considered the jury instructions where they were relevant, because the court relied heavily on the instructions in rejecting the government's harmless error argument on the APC counts. See Pet. App. 9a-10a.

Petitioners also argue (Pet. 26) that the court ignored "exculpatory" testimony by Radler that, when petitioners ordered the $600,000 payments, they believed that non-competition agreements had actually been executed. In fact, however, Radler testified that he and Black ordered the payments only *after* he learned that "there [were] no non-competes." J.A. *Black I* 148a-149a. Radler further testified that Forum and Paxton had not requested non-competition agreements and that he "knew" the $600,000 "payment was wrong." Pet. App. 190a.[7]

Finally, petitioners argue (Pet. 26) that Radler's "clowning note," which the court read as an admission that the non-competition agreements were "fabrications," was equally susceptible to the opposite interpretation. Pet. App. 13a. The court's implicit rejection of that argument was correct, especially in light of Radler's admissions at trial that Forum and Paxton had not requested individual non-competition agreements and no agreements existed. Furthermore, given the other compelling evidence of petitioner's guilt identified by the court of appeals—including the disinterested testimony of officials of Forum/Paxton that they did not request non-competition agreements; the absence of any plausible motive on their part for doing so because petitioners could have had no interest in competing as individuals with small community newspapers; and petition-

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[7] Petitioners incorrectly state that a September 1, 2000, memorandum by Kipnis "confirmed" that the Forum/Paxton deal contemplated non-competition agreements involving individual Hollinger executives. Pet. 26; see Pet. 6-7 n.2. That memorandum concerned another transaction and said nothing about *individual* non-competes in connection with the Forum/Paxton deal. See Pet. App. 321a-322a.

ers' concession that no non-competition agreements actually existed—Radler's note was insignificant.

2. Black's claim (Pet. 26-28) that the court of appeals erred in refusing to reverse his obstruction-of-justice conviction also does not warrant this Court's review.

As an initial matter, Black's argument is based on the mistaken premise that the obstruction conviction must be reversed unless the government proves harmless error under the *Chapman* standard. The *Chapman* standard governs whether a conviction must be reversed when a constitutional error occurred in obtaining *that* conviction. The *Chapman* standard does not govern whether Black's obstruction conviction must be reversed because no court has found that any error occurred in obtaining the obstruction conviction, much less constitutional error. Instead, Black claims that "prejudicial spillover" from an error in obtaining his entirely separate convictions for mail fraud requires reversal of the otherwise valid obstruction conviction. Pet. App. 6a; 130 S. Ct. 2970 n.14.

The "prejudicial spillover" doctrine recognizes that, in certain cases where a defendant has been tried on multiple counts, and his conviction on one of those counts is reversed on a ground that requires dismissal of that count, retrial may be required on other counts because of prejudicial spillover from evidence introduced in support of the dismissed count. See, *e.g.*, *United States* v. *Cross*, 308 F.3d 308, 317 (3d Cir. 2002); *United States* v. *Rooney*, 37 F.3d 847, 856 (2d Cir. 1994). Reversal is not required, however, unless the allegedly prejudicial evidence "would not have been admitted but for the dismissed charges." *United States* v. *Prosperi*, 201 F.3d 1335, 1345 (11th Cir.), cert. denied, 531 U.S. 956 (2000); see *Cross*, 308 F.3d at 317; *United States* v.

Edwards, 303 F.3d 606, 640 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 537 U.S. 1240 (2003); *Rooney*, 37 F.3d at 855-856.

The defendant has the burden of showing that evidence used to prove the dismissed count would have been inadmissible to prove a remaining count. See *United States* v. *Arledge*, 553 F.3d 881, 896 (5th Cir. 2008), cert. denied, 129 S. Ct. 2028 (2009); *Edwards*, 303 F.3d at 640. If the government has any burden at all, it arises only after the defendant has made that showing. See *Cross*, 308 F.3d at 318 (stating that, if the defendant shows that evidence used to prove the remaining count would have been inadmissible, then the question is whether that "error" was "harmless"); but see *Arledge*, 553 F.3d at 896 (stating that the defendant has the burden to "demonstrate both that the evidence was inadmissible and [that it was] prejudicial") (internal quotation marks and citation omitted); see also *United States* v. *Lazarenko*, 564 F.3d 1026, 1043 (9th Cir.) (the "defendant 'must show compelling prejudice'" (citation omitted)), cert. denied, 130 S. Ct. 491 (2009); *United States* v. *Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir.) (same), cert. denied, 519 U.S. 950 (1996); *Callanan* v. *United States*, 881 F.2d 229, 236 (6th Cir. 1989) (same), cert. denied, 494 U.S. 1083 (1990). Insofar as the government has the burden of proving harmlessness, the applicable standard, as in all cases involving nonconstitutional error in admitting evidence, is not the *Chapman* standard but the standard set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) —whether the verdict on the remaining count was "substantially swayed by the error." See *Cross*, 308 F.3d at 318.

Black cannot get past the first step of the prejudicial spillover analysis. Virtually all of the evidence admitted on the fraud counts would still have been admissible if the government had proceeded only on a pecuniary fraud theory. See Pet. App. 6a. Indeed, virtually all of the evidence would have been admissible to prove that Black acted with the "corrupt[] intent" necessary to show obstruction of justice, 18 U.S.C. 1512(c)(1), even if the government had not charged Black with fraud at all. See Fed. R. Evid. 404(b).

In any event, the jury's verdict on the obstruction count was not "substantially swayed" by the erroneous instruction on honest services fraud. Black argues (Pet. 27) that the fraud instruction pushed the jury towards conviction on the obstruction count by creating the mistaken impression that Black was guilty of honest services fraud. But to find Black guilty of obstruction, the jury did not have to find that he *committed* the crimes for which he was being investigated; the jury had to find only that he concealed records for the purpose of subverting an official proceeding. As the court of appeals explained, even if the jury had not been instructed on honest services fraud, "[i]t would still have been the case that Black had known he was being investigated for fraud and could not have known that years later the Supreme Court would invalidate one of the fraud charges." Pet. App. 6a-7a. Moreover, "Black had also to fear—and just as acutely—being prosecuted for pecuniary fraud, as of course he was, and the elements of that crime are unchanged from when he acted." *Id.* at 8a.

As the court of appeals also noted, the "esoteric" instructions that honest services fraud could be based on fiduciary non-disclosure, although erroneous, were not "inflammatory." Pet. App. 6a. And the evidence

that Black committed obstruction, which was "very strong," would have been the same even if he had not been charged with honest services fraud. *Ibid.* With full knowledge of an SEC investigation, a grand-jury investigation, and a criminal investigation closing in on him, Black knowingly removed 13 boxes of pertinent documents from his office, sneaking them out the back after his assistant was prevented from removing them earlier in the day. Black's actions, including his efforts to evade security cameras, were captured on video and played for the jury. Nothing about the erroneous honest services fraud instruction affected the reliability of Black's obstruction conviction. And the court of appeals' case-specific determination to that effect does not warrant this Court's review.

3. Petitioners mistakenly contend (Pet. 29-30) that this Court's review is warranted to resolve a purported conflict between the decision below and decisions of the Tenth and Eleventh Circuits holding that, in alternative theory cases, harmless error review must focus exclusively on the erroneously instructed theory and harmlessness cannot be based on "overwhelming evidence of the properly instructed ground." Pet. 29 (quoting *United States* v. *Holly*, 488 F.3d 1298, 1307 & n.6 (10th Cir. 2007), cert. denied, 552 U.S. 1310 (2008); and citing *Parker* v. *Secretary for the Dep't of Corr.*, 331 F.3d 764 (11th Cir. 2003), cert. denied, 540 U.S. 1222 (2004); *United States* v. *Holland*, 116 F.3d 1353 (10th Cir.), cert. denied, 522 U.S. 902 (1997); and *Adams* v. *Wainwright*, 764 F.2d 1356 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986)).

The decisions on which petitioners base their claim of conflict predated this Court's decision in *Pulido*, and *Pulido* abrogated their holdings. In *Pulido*, the trial

court instructed the jury that the defendant could be found guilty of felony murder either if he formed the intent to aid and abet the felony before the murder or if he formed that intent only after the murder. The California Supreme Court ruled that the latter theory was invalid under California law. 129 S. Ct. at 531. This Court held that the instructional error was subject to harmless error review, *id.* at 532, even though a finding of harmlessness could not have been established based on consideration of the invalid theory alone (because a corrected instruction under that theory would have been the same as the alternative valid theory). The Tenth and Eleventh Circuits have not yet had an opportunity to reconsider their precedents in light of *Pulido*.

Moreover, the Tenth and Eleventh Circuit decisions recognize that alternative theory error may also be found harmless based on a functional equivalence analysis, *i.e.*, where "facts necessarily found by the jury encompass the findings required to support a conviction on a valid ground." *Holly*, 488 F.3d at 1306 n.5.; see *Adams*, 764 F.2d at 1362-1363. It is therefore likely that those courts would have reached the same result on the Forum/Paxton count as the court below.

4. Petitioners also err in asserting (Pet. 31-32) that the decision below conflicts with *United States* v. *Brown*, 202 F.3d 691, 701 (4th Cir. 2000), which holds that instructional error is not harmless under *Neder* if the defendant "raised evidence sufficient to support" an acquittal, and with other decisions holding that harmless error review requires consideration of defense evidence that undermines the government's case. See Pet. 31-32 n.6 (citing *United States* v. *Hands*, 184 F.3d 1322, 1330-1331 & n.23 (11th Cir. 1999), and *United States* v. *Manning*, 23 F.3d 570, 575 (1st Cir. 1994), cert. denied,

519 U.S. 853 (1996)). As discussed above, the court of appeals correctly applied the *Neder* standard, taking into account the defense case, and determined that "no reasonable jury could have refused" to find petitioners guilty of pecuniary fraud. Pet. App. 13a-14a. In any event, nothing in *Brown* or the other cases cited by petitioners calls into question the court's alternative determination that the jury actually found facts establishing petitioners' guilt of pecuniary fraud in the Forum/Paxton scheme.[8]

5. Finally, petitioners erroneously argue (Pet. 17, 33-34) that the decision below conflicts with various state court decisions. Petitioners cite those cases for the propositions that the *Chapman* harmless-error standard looks to the basis on which the jury actually rested its verdict and that a court may not find an error harmless under *Chapman* based on the overwhelming weight of the government's proof. But the court below rested its harmlessness determination on the actual basis of the jury's verdict, concluding from the verdict that the jury necessarily found that the Forum/Paxton scheme involved pecuniary fraud. Although the court's harmless error review also took into account the overwhelming strength of the government's case, none of the state decisions that petitioners cite holds that courts may not do so.

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[8] Petitioners contend (Pet. 31) that *Brown* conflicts with dictum in *United States* v. *Jackson*, 196 F.3d 383 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000), suggesting that instructional error may sometimes be harmless even if the defendant proffered sufficient evidence to support an acquittal under correct instructions. Any tension between *Brown* and *Jackson* is not implicated here because the court below concluded that the evidence was not sufficient to support an acquittal of pecuniary fraud on the Forum/Paxton count.

Two of the cases, *Lowry* v. *State*, 657 S.E.2d 760 (S.C. 2008), and *Fields* v. *United States*, 952 A.2d 859 (D.C. 2008), actually applied overwhelming evidence analysis. See 657 S.E.2d at 766; 952 A.2d at 866. Moreover, *Fields* expressly recognized that *Neder* endorses an "overwhelming evidence test." 952 A.2d at 863.

Some Florida Supreme Court decisions hold that an error may not be found harmless under the *Chapman* standard based on the overwhelming strength of the prosecution's case when there remains a reasonable possibility that the error affected the verdict. *Cooper* v. *State*, 43 So.3d 42, 43 (2010) (per curiam); *Ventura* v. *State*, 29 So.3d 1086, 1089 (2010); *Rigterink* v. *State*, 2 So.3d 221, 256 (2009) (per curiam), vacated on other grounds, 130 S. Ct. 1235 (2010). But those decisions also make clear that "*close examination of the permissible evidence* on which the jury could have legitimately relied" is a required part of the analysis. *Ibid.* (citation omitted); *Ventura*, 29 So.3d at 1089 (citation omitted). Moreover, the Florida Supreme Court has repeatedly relied on overwhelming evidence of guilt in finding errors harmless. See, *e.g.*, *Hojan* v. *State*, 3 So.3d 1204, 1210, cert. denied, 130 S. Ct. 741 (2009); *Fitzpatrick* v. *State*, 900 So.2d 495, 517 (2005); *Hutchinson* v. *State*, 882 So.2d 943, 952 (2004); *Walton* v. *State*, 847 So.2d 438, 448 (2003); *Chavez* v. *State*, 832 So.2d 730, 754, 762 (2002), cert. denied, 539 U.S. 947 (2003); *Henyard* v. *State*, 689 So.2d 239, 248 (1996), cert. denied, 522 U.S. 846 (1997).

In *People* v. *Hardy*, 824 N.E.2d 953 (2005), the New York Court of Appeals stated that, "however overwhelming may be the quantum and nature of other proof, the error is not harmless . . . if there is a reasonable possibility that the . . . [error] might have

contributed to the conviction." *Id.* at 957-958 (internal quotation marks and citation omitted; brackets in original). In a more recent case, however, that court found constitutional error harmless based on overwhelming evidence of guilt. *People* v. *Wardlaw*, 849 N.E.2d 258, 260 (2006). And the intermediate appellate courts in New York understand *Hardy* to permit consideration of the strength of the government's proof in assessing harmlessness. See, *e.g.*, *People* v. *Trout*, 808 N.Y.S.2d 379, 380 (N.Y. App. Div. 2005).

Similarly, the New Mexico Supreme Court has stated that constitutional error cannot be harmless "simply because there is overwhelming evidence of the defendant's guilt," *State* v. *Alvarez-Lopez*, 98 P.3d 699, 709-710 (2004), and that a constitutional error is not harmless if "there is a reasonable possibility" that it "might have contributed to the conviction." *Id.* at 708 (internal quotation marks and citation omitted). That court has also made clear, however, that the strength of the prosecution's case is an important factor in the harmless error analysis. See *id.* at 710; *State* v. *Stephen F.*, 188 P.3d 84, 94 (2008); *State* v. *Walters*, 168 P.3d 1068, 1077 (2007).

The decision below does not conflict with any of those cases. The court of appeals did not conclude that the instructional error could be harmless even if it could have contributed to the verdict. On the contrary, because the court concluded that the error may have affected the verdict on the APC counts, the court found that the error was *not* harmless as to those counts. Pet. App. 9a-10a. And the court concluded that the error was harmless on the Forum/Paxton count only after finding both that the jury necessarily found facts establishing petitioners' guilt of pecuniary fraud (*id.* at 12a-

13a) and that "the evidence of pecuniary fraud [was] so compelling that no reasonable jury could have refused to convict." *Id.* at 13a-14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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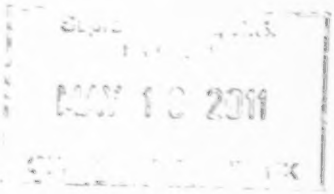

No. 10-1038

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

The Seventh Circuit recognized that the honest-services instructions permitted conviction solely for "failure to level with the board and the audit committee." Pet. App. 10a. This Court has already held that "failure to level" is not a crime. Yet the Seventh Circuit deemed the error "harmless" as to count 7 because the defense evidence and arguments were "implausible," "decisively unbelievable," and "clowning," while the government's "disinterested" witnesses provided such "compelling" evidence that "no reasonable jury could have refused to convict." *Id.* at 11a-14a. And although the obstruction charge identified this flawed prosecution as a predicate that could support conviction, the Seventh Circuit ruled the error harmless on identical reasoning: The government's evidence was "compelling," and Black's contrary evidence (such as the "loya[l]" testimony of his assistant) could readily be dismissed as biased. *Id.* at 5a-6a.

We restate the Seventh Circuit's holding and reasoning because the government shows little stomach for addressing them, much less defending them head-on. Instead, the government manufactures alternative rationales that it ascribes to the Seventh Circuit, trots out new theories it never presented below, and never quite gets around to addressing the Sixth Amendment, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), *Yates* v. *Evatt*, 500 U.S. 391 (1991), or *Rose* v. *Clark*, 478 U.S. 570 (1986). The government's effort to airbrush these cases out of the law, like its insistence that the Seventh Circuit actually applied a "functional equivalence" analysis, recalls Khrushchev-era apparatchiks excising disfavored

Party leaders from May Day Parade photographs. It is just as unconvincing.

The government ignores this Court's cases because it has so little to say about why the Court's review is unwarranted. The lower courts are deeply divided on the proper application of harmless-error review after *Neder* v. *United States*, 527 U.S. 1 (1999), including particularly whether *Neder* replaced this Court's traditional focus on "the verdict obtained," *Chapman* v. *California*, 386 U.S. 18, 24 (1967), with an abstract inquiry into whether "overwhelming" evidence would have led to the same result anyway. Because the opinion below directly implicates this disagreement and violates the Sixth Amendment, review is warranted.

I. THE LOWER COURTS ARE DEEPLY DIVIDED ON THE PROPER HARMLESSNESS STANDARD AFTER *NEDER*.

A. The question whether *Neder* jettisoned decades of this Court's harmless-error jurisprudence in favor of an "overwhelming evidence" test has deeply divided the lower courts. The government insists that the so-called "*Neder* standard" is "just another way" of framing the harmless-error inquiry under *Chapman*. Opp. 16. But this is not, as the government would have it, a semantic dispute over alternative ways of accurately stating the holding of *Chapman*, or a "fact-bound disagreement" with a pedestrian application of *Neder*. Opp. 16-17.

As Justice Stevens noted in *Neder*, there is "a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue." 527 U.S. at 27 (Stevens, J., concur-

ring). Indeed, the government's claim is obviously untrue where, as here, the jury could find guilt on alternative theories, one of which is invalid: Even if a "rational jury" would have convicted the defendant on the valid theory, the error could have contributed to the verdict precisely "because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983).

Neder was, by its terms, limited to cases involving an "omitted element" that "was uncontested and supported by overwhelming evidence." 527 U.S. at 17. The Court described *Neder*'s unusual circumstances as "the legal equivalent of a laboratory test tube," *id.* at 14, and rejected the notion that a hypothetical-reasonable-jury standard in that context would become precedent for dispensing more generally with Sixth Amendment protections. "Happily," the Court said, "our course of constitutional adjudication has not been characterized by [an] 'in for a penny, in for a pound' approach." *Id.* at 17 n.2.

The government nonetheless reads *Neder* as prescribing a hypothetical-reasonable-jury standard for evaluating harmlessness in all cases—one that needn't focus on "what the jury *actually* found." Opp. 17 n.6. Under this "*Neder* standard," it says, an error is harmless if "no properly instructed jury could reasonably have refused to find the defendant guilty." Opp. 16. This argument turns *Neder*'s "penny" into a guinea. It is not only an unreasonable reading of *Neder*, but one explicitly foreclosed by *Evatt*, *Sullivan*, and *Rose*.

Those cases confirm that "the issue under *Chapman* is whether the jury *actually rested its verdict*" on a proper basis, "independently of" and "without reliance on" the error. *Evatt*, 500 U.S. at 404

(emphasis added); *see also Sullivan*, 508 U.S. at 279. Juries *may* "refuse" to convict on the government's evidence—a rule that *Neder* "reaffirm[ed]." 527 U.S. at 17 n.2. Indeed, if *Neder*'s "overwhelming evidence" test were generally applicable, it would necessarily overrule not merely a single "strand of the reasoning in *Sullivan*" (*id.* at 11) but all applications of structural-error analysis—an analysis this Court has reaffirmed since *Neder*. Pet. 23.

B. The lower courts are divided on whether "*Neder* [is] limited to *Neder*-type cases" or is a "test of general application." *State* v. *Hale*, 691 N.W.2d 637, 650-51 (Wis. 2005) (Abrahamson, J., concurring). The government concedes that the Second and Fourth Circuits have reached different conclusions on this issue, but suggests that the disagreement is not widespread. Opp. 25 n.8. It is not *only* the courts of appeals that have divided; there is also widespread disagreement among state courts of last resort.

State courts "permit consideration of the strength of the government's proof" (Opp. 27) as potentially *relevant* when assessing whether the body of evidence that indisputably was accepted by the jury would be less persuasive if one improperly admitted item were removed. Pet. 21. Tellingly, all but one of the cases cited by the government address the improper admission or exclusion of evidence. *See* Opp. 26-27. (The exception, *Lowry*, invoked *Sullivan*'s actual-verdict test. Pet. 33.)

This analysis cannot easily be transplanted to instructional errors, particularly where, as here, an erroneous instruction removes any assurance that the jury considered (much less credited) *any* of the evidence that might establish guilt under a legally

correct view. *Evatt*, 500 U.S. at 405-06. And even in evidentiary cases, *Olden* v. *Kentucky*, 488 U.S. 227, 233 (1988), and several circuit rulings that the government nowhere addresses reject the notion that evidence is "overwhelming" if, as here, the jury acquitted on other charges based on the same evidence. Pet. 24.

In any event, the government has no answer to the view shared by many state courts of last resort that constitutional error cannot be harmless "simply because there is overwhelming evidence of the defendant's guilt" and without "assessing the likely impact of the error on the jury's verdict." *State* v. *Alvarez-Lopez*, 98 P.3d 699, 709-10 (N.M. 2004); *see also*, *e.g.*, *Cooper* v. *State*, 43 So. 2d 42, 43 (Fla. 2010). Those courts, which read *Chapman*, not *Neder*, as providing the controlling standard in the general run of cases, contrast starkly with several others that the government wholly ignores. Pet. 32-33.

The Seventh Circuit took sides in this debate over a decade ago, concluding that *Chapman*'s "contribute to the verdict" standard is "onerous" and "not the proper test" after *Neder*. *Lanier* v. *United States*, 220 F.3d 833, 839 (7th Cir. 2000) (asking instead whether the defendant "would have been convicted" anyway). The decision below continues to apply this view, and it warrants the Court's scrutiny.

C. The lower-court disagreement regarding the appropriate test for harmlessness extends to the context of alternative-theory errors. The government does not dispute that the Tenth and Eleventh Circuits disagree with the Seventh and Eighth Circuits over whether such an error can be deemed harmless solely because the government presented strong evidence of guilt on the valid theory. Pet. 29-30. But it

wrongly claims that the Tenth and Eleventh Circuits' precedents have been "abrogated" by *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008).

Pulido's holding that alternative-theory error is *subject to* harmless-error review (129 S. Ct. at 532) says nothing about the appropriate *method* for determining harmlessness. And in reversing the Ninth Circuit for treating alternative-theory error as structural error warranting automatic reversal, *Pulido* certainly did not "abrogat[e]" earlier decisions that had *applied* harmless-error review. Far from overruling *sub silentio* the *Stromberg-Yates* rule requiring reversal if the basis for the jury's verdict cannot be ascertained, the Court's reasoning was that harmless-error review is appropriate for alternative-theory errors because a court can analyze the *erroneous* part of the instruction just as it could "where the *only* charge on the critical issue was a mistaken one." *Id.* at 532; *see also* Pet. 19. That reasoning validates, rather than "abrogates," the analysis prevailing in the Tenth and Eleventh Circuits.[1]

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[1] No one disputes harmlessness where the instructions, while proffering an invalid theory, necessarily required the jury to find guilt on the *valid* theory. *See, e.g.*, *United States* v. *Rastelli*, 870 F.2d 822, 831 (2d Cir. 1989) (jury instructed *conjunctively* on valid and invalid theories). The question that apparently vexes the government is whether an affirmance on this basis would be labeled "harmless error" or, as *Pulido* suggested in passing, "no violation." 129 S. Ct. at 533; Opp. 17 n.6. Since the government elsewhere recognizes that this scenario—"functional equivalence"—*is* an application of harmless error (while wrongly claiming the court below applied it here), it is difficult to see how this supposed distinction bolsters its reading of *Pulido*.

The government protests that, on *Pulido*'s facts, the State's theory of harmlessness involved assessing whether overwhelming evidence supported the valid theory. Opp. 17 n.6. But even if this was the *State's* theory, all *this Court* held was that alternative-theory errors are not categorically exempt from harmless-error analysis—not that the State's case-specific harmlessness points were well-taken. The Court "express[ed] no view" on that question. 129 S. Ct. at 533.

In any event, the alternative-theory split has deepened since the filing of the petition, with the Third and Fifth Circuits staking contradictory positions on whether "overwhelming" evidence on the valid theory establishes harmlessness. *Compare United States* v. *Skilling*, — F.3d —, 2011 WL 1290805, at *2 n.2 (5th Cir. Apr. 6, 2011) (*Neder* "permits a court to find harmlessness based *solely* on the strength of the evidence supporting the valid theory" (emphasis added)), *with United States* v. *Coniglio*, 2011 WL 791347, at *2 n.4 (3d Cir. Mar. 8, 2011) (unpub.) ("overwhelming evidence" on the valid theory "does not alone carry the day").

II. THE SEVENTH CIRCUIT DID NOT APPLY A "FUNCTIONAL EQUIVALENCE" APPROACH.

The government devotes less than five pages to the relevant lower-court disagreements; instead, its consistent refrain is that they are not implicated here because, in addition to relying on the "*Neder* standard," the Seventh Circuit found the error harmless under a "functional equivalence" approach: by ruling "that the jury actually found facts establishing [petitioners'] guilt" on the "valid pecuniary fraud theory." Opp. 13-14. The Seventh Circuit neither found

nor could have found the error harmless on this theory.

The functional-equivalence approach recognizes that an instructional error may be harmless "[w]hen the predicate facts relied upon in the [erroneous] instruction" are "so closely related to the ultimate fact" under a correct instruction that "no rational jury could find those facts without also finding that ultimate fact." *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring). Similarly, in a case involving factually overlapping counts, the untainted counts may "operat[e] like special verdicts" to "show [what] the jury found." *Brennan* v. *United States*, 867 F.2d 111, 115 (2d Cir. 1989). By demonstrating that the jury "necessarily found" the requisite facts despite the error, *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998) (en banc), the government can satisfy its burden under *Chapman* of negating any "reasonable possibility" that the instructional error "might have contributed to the conviction," 386 U.S. at 23-24.

The government eschews any discussion of the instructions (Opp. 18) because they show that the Seventh Circuit's affirmance on count 7 could not possibly rest on any functional-equivalence analysis: The identical instructions for all fraud counts, far from "necessarily" requiring the jury to find pecuniary fraud, concededly permitted conviction for nondisclosure—"failure to level." Pet. App. 10a. The honest-services charge was thus not a subset of pecuniary fraud, as the government suggests, but provided a significantly *broader* basis for conviction. The jury needn't even have *considered* whether petitioners engaged in theft if it was satisfied by the honest-services theory, Pet. 10-11, and, even if some

jurors did, the unanimity instructions removed any conceivable basis for a "functional equivalence" argument. It was therefore impossible to say—and the Seventh Circuit did not—that a unanimous jury necessarily found theft.

What the government calls "functional equivalence" is something vastly different: the Seventh Circuit's view that, "[i]f the jury believed that failure to disclose legitimate fees was honest services fraud, then it would not have acquitted on the other two Forum/Paxton counts." Opp. 14. Those acquittals, the government says, "make sense" if "the jury's guilty verdict was based on a pecuniary fraud theory." Opp. 14 n.5. The Seventh Circuit's *actual* theory for reconciling the Forum/Paxton verdicts was its erroneous assertion that the acquittals involved agreements with the *victim* (rather than, as the government quietly acknowledges, Opp. 6, a holding company controlled by petitioners). The court's error shows it did not even understand the information's theory of what the criminal scheme was; that scarcely supports the claim that its careful review ensured there was "functional equivalence."[2]

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[2] The government's functional-equivalence arguments also grossly distort the record. Among several examples, Radler testified that Kipnis told him the non-competes had not been signed *two years after the payments*. Opp. 5 n.3; *compare* Pet. App. 189a. Moreover, while Kipnis's memorandum notifying the Audit Committee of non-compete agreements "concerned another transaction" (Opp. 19 n.7) in the *subject line*, the memorandum disclosed that the pending sale to "Paxton and Forum" also "require[d] a noncompete agreement." Pet. App. 321a-322a.

More fundamentally, the government's attempt to "make sense" of the verdicts begs the question and gets the *Chapman* analysis precisely backwards: It *presumes* that the jury "found" the valid alternative if there is any hypothesis of the other verdicts that can be made consistent with this supposed "finding." The most obvious theory for the guilty verdict—that the jury relied on the invalid alternative, as it was told it could—is assumed away at the first step of this "analysis."

III. THE OBSTRUCTION COUNT IS ALSO TAINTED.

The government attempts to save the obstruction conviction by arguing that it is governed by *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and by misstating the issue as exclusively one of *evidentiary* spillover—an argument that Black *disclaimed* below. The government's arguments are meritless.

A. The government never argued below that *Kotteakos* governs prejudice on the obstruction charge, or that Black bore the burden of proving it. Opp. 20-22. Apart from being waived, those circular arguments are meritless: The government cites *no* authority holding that the duty to assess prejudice under *Chapman* is limited to particular counts, much less only counts that the government self-servingly identifies as being affected by its error. As *Neder* acknowledged, *Chapman* requires analysis of the error's effect on the "verdict obtained," 527 U.S. at 17, and this inquiry would extend to other counts unless "the improper instruction had no bearing on" them, *id.* at 13.

B. The flawed honest-services instruction not only had a "bearing" on the obstruction charge; the instructions tied the two together inextricably. This is not, therefore, a case of mere *evidentiary* spillover,

where the gravamen of the argument is retroactive misjoinder—*i.e.*, that the counts should have been severed because the factual allegations initially supporting joinder turn out to be meritless. *Schaffer* v. *United States*, 362 U.S. 511, 515-17 (1960).

The government devotes its entire argument to refuting an evidentiary "spillover" claim, after Black made abundantly clear that his claim was just the opposite. Because the government is simply pretending that the argument below was about something else, petitioners have included the relevant portions of the Seventh Circuit briefing as an addendum. "Whether or not the same evidence would come in if the minutiae of Delaware law were not at issue," Black explained, "the government's spillover argument does not even address the argument we made: that *this* jury, which *acquitted* Mr. Black on the bulk of the government's case, would likely have credited his innocent explanation for removing his effects if they had known that the honest services theory (on which the three fraud convictions most likely rested) was not mail fraud." Add. 5a-6a. "The spillover prejudice here" occurred *because* of the same "mutually dependent" and "inextricable" connection between "the predicate offenses and the obstruction offense" that allowed the evidence's admission, *id.* at 3a-4a, combined with a *legal* error in the description of one of the predicates on which the jury could permissibly have based its verdict. *See*, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 312-13 (1957).

C. Whether assessed under *Chapman* or *Kotteakos*, the legal error in defining fraud clearly prejudiced Black: Even if the jury firmly believed that Black had not engaged in theft, it was left with the erroneous impression that he might be motivated

to impede justice because he faced severe criminal penalties for corporate missteps involving related-party transactions and Audit Committee procedures. Thus, as in other cases involving *Yates-Stromberg* errors, it is no answer to say that the jury also had *available* other legally valid alternatives on which its verdict *could* rest. Opp. 22. And the Seventh Circuit resolved that problem just as it addressed the mail-fraud counts—by touting the government's supposedly "compelling" evidence and ignoring or deriding the evidence that supported acquittal. Pet. App. 5a. The government's rehash of the same weak evidence as sufficient to satisfy *Chapman* (Opp. 23) merely confirms the urgent need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2011

ADDENDUM

Nos. 07-4080, 08-1030, 08-1072, 08-1106, consolidated

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, ***Plaintiff-Appellee,*** **v.** **CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,** ***Defendants-Appellants***	**Appeal from the District Court for the Northern District of Illinois, Eastern Division** **No. 05-CR-727** **Judge Amy J. St. Eve**

APPELLANTS' JOINT CIRCUIT RULE 54 STATEMENT

* * *

1. The Supreme Court identified the spillover arguments it was remanding as those appearing at "Brief for Petitioners 47-49." *Black*, slip op. at 8 n.14. There Black argued, as he had in the certiorari petition, that "[h]aving acquitted on every other count, the jury had only its incorrect understanding of the law applicable to counts 1, 6 and 7 as reason to believe Black would try to impede a search for the truth." *Black* Petr's Merits Br. 49. Moreover, "[a]ny juror would have had abundant reason to doubt that Black corruptly intended to undermine the factfinding of an official proceeding . . . . That doubt would only have heightened without the influence of considerable prejudicial evidence." *Id.*; *see also Black*

Petr's Merits Reply Br. 24-25 (arguing that a properly instructed jury could have concluded that Black committed "*no* offense at all" and, especially in light of prejudicial evidence from the government's attempt to prove RICO, tax offenses and other frauds, not found persuasive the government's proof on Black's intent).

The government's response treats these arguments as if they were predicated solely on retroactive misjoinder. The government thus suggests that no "spillover" prejudice can ever be shown if the evidence on the reversed counts would have been admissible in an error-free trial, and once again asserts that its evidence of Black's guilt on this count was "strong." Gov't Bail Opp. 16-17 (citing *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000)). But this analysis is doubly mistaken, because Black is not asserting misjoinder and the evidence on this count on the key disputed element — intent corruptly to obstruct — was remarkably thin.

To begin with, there are a number of broadly related "spillover" doctrines. *See, e.g., United States v. Lazarenko*, 564 F.3d 1026, 1042-43 & n.10 (9th Cir. 2009) (noting that "retroactive misjoinder" and "prejudicial spillover" are "often used interchangeably" even though they are "related" concepts). The branch of the doctrine invoked by the government comes into play when an indictment alleged a basis for trying certain offenses together but the court (at trial or on appeal) later determines that the prosecution failed to prove factual assertions underlying the count that justified joinder. *See Prosperi*, 201 F.3d at 1345 ("Prosperi argues his convictions on the tax counts were impermissibly tainted by the substantial evidence admitted on the mail fraud and money

laundering counts that were dismissed before submission to the jury"). As the Supreme Court long ago recognized, a defendant advancing such a claim essentially asserts that the failure of proof "retroactively" gave rise to a new *error* — misjoinder. *See e.g., Schaffer v. United States*, 362 U.S. 511, 515-17 (1960); *see also United States v. Holzer*, 840 F.2d 1343, 1349-51 (7th Cir. 1988) (Posner, J.) (expressing skepticism of "retroactive misjoinder" branch of the doctrine except in rare cases). And because the gravamen of such a claim is that the counts should not have been tried together at all, courts hold that the claim cannot succeed if the evidence supporting the allegedly misjoined count would have been admissible in any event. Courts apply a similar analysis when one of the counts is reversed because the conduct proven is not a crime at all *and* the remaining convictions are logically *unrelated* to the reversed count. *See, e.g., United States v. Rooney*, 37 F.3d 847, 849 (2d Cir. 1994) (reversed count, which court found not be a crime, was "unrelated to the submission of cost justifications" that furnished the basis for the remaining false-statements counts, and caused the presentation of evidence that otherwise would not be admissible on those counts).

Black is not claiming that counts 1, 6 and 7 were so bereft of evidentiary support that they never should have been tried with the obstruction charge. Nor is he asserting that instructional error in this case demonstrates that those counts otherwise were misjoined with the obstruction count. The spillover prejudice here flows from the "mutually dependent" and "inextricable" connection between the predicate offenses and the obstruction offense, which is precisely what makes joinder *proper*. *E.g., Rajewski*, 526 F.2d at 155. * * *

* * *

Thus, in cases like this, as in *Yates*, the relevant prejudice flows from a *legal* error in the description of one of the predicates on which the jury could permissibly have based its verdict in accordance with its instructions. *See Yates*, 354 U.S. at 311-12 (conspiracy with multiple objects, one of which was not a crime); *Bachellar v. Maryland*, 397 U.S. 564, 569-72 (substantive offense; "in light of the instructions given by the trial judge, the jury could have rested its verdict on any number of grounds," one of which could not constitutionally be made a crime). As the Supreme Court has noted, "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question . . . fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). * * *

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Nos. 07-4080, 08-1030, 08-1072, 08-1106, consolidated

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APPELLANTS' JOINT RESPONSE TO GOVERNMENT'S CIRCUIT RULE 54 STATEMENT

* * *

* * * The government's "same evidence would have been admitted" argument (Gov't Rule 54 St. 26) misses the target by a wide margin — and for the second time in as many months. As Black clearly argued in his bail papers: "Whether or not the same evidence would come in if the minutiae of Delaware law were not at issue, the government's spillover argument does not even address the argument we made: that *this* jury, which *acquitted* Mr. Black on the bulk of the government's case, would likely have credited his innocent explanation for removing his effects if they had known that the honest services

theory (on which the three fraud convictions most likely rested) was not mail fraud." Black Bail Reply 7.

If much the same evidence would have been admitted, as the government contends, that is precisely because the obstruction charge and the underlying fraud offenses *were* so closely intertwined. It may well be true, as the government urges, that joinder of closely intertwined counts rarely poses a problem in cases where the validity of the jury instructions is not at issue. Gov't Rule 54 St. 25-26 (citing cases assessing prejudice when some counts are dismissed for insufficiency of proof). But none of the cases the government cites addresses the rule that prejudice from *legal* error in one or more counts of conviction will require reversal of another closely intertwined count. Defendants' Rule 54 St. 37-38 (citing cases involving legal error as opposed to failure of proof). Although one would never guess it from reading the government's papers, *that* is precisely the error asserted and established in this case.

* * *